LAW RELATING TO GENERAL AND PARTICULAR AVERAGE

LAWRENCE DUCKWORTH

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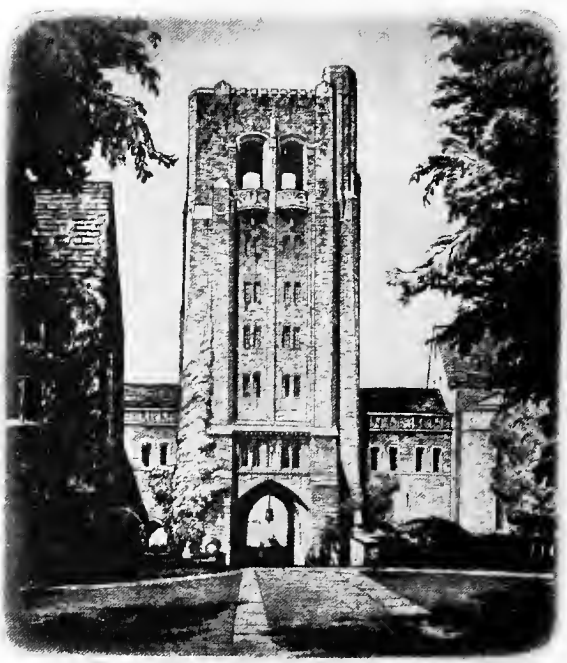
EFFINGHAM WILSON



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THE

LAW RELATING TO GENERAL AND PARTICULAR AVERAGE

(FOR THE USE OF UNDERWRITERS AND OTHER PERSONS)

BY

LAWRENCE DUCKWORTH

(OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW)

AUTHOR OF THE "LAW AFFECTING TRUSTEES IN BANKRUPTCY," "A COMPLETE SUMMARY OF THE LAW RELATING TO THE ENGLISH NEWSPAPER PRESS," "THE LAW AFFECTING THE TURF, BETTING AND GAMING-HOUSES AND THE STOCK EXCHANGE,"

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PREFACE.

THIS volume has been compiled for the convenience of Underwriters and other persons who desire to possess a concise statement of the law on the subject of Average.

I venture to hope that it may be found of use to them.

I am indebted to the courteous secretary of Lloyd's (Col. H. M. Hozier, C.B.), and to T. E. Bellen, Esq. (Secretary of the Liverpool Underwriters' Association), for their kindness in allowing me to make use of the matter contained in the Appendix.

LAWRENCE DUCKWORTH.

MIDDLE TEMPLE,
Oct., 1900.

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THE LAW AFFECTING GENERAL AND PARTICULAR AVERAGE.

(FOR THE USE OF UNDERWRITERS AND OTHER PERSONS.)

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THE expression "average," as used in maritime law, is a foreign word—a Latin term in fact. It has for nearly eighteen centuries been regarded as an unintelligible, or doubtful, symbol. Average, in its original form, seems to have been indispensable to the daily concerns of the population on the Mediterranean shores.

Average has been variously defined, and some

of the definitions are as follows: "In a marine sense, average and contribution are synonymous terms"; "a term used in commerce to signify a contribution made by ship, freight and goods on board a ship, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, in order that the particular sufferer may not in the end be a greater loser than the rest of the persons interested in the ship and goods on board. Average, then, understood in this sense, is called general or gross average, because it falls upon the whole or gross amount of the ship, freight and cargo, and also to distinguish it from what is often improperly termed particular average, but which, in truth, means a particular or partial, and not a general loss, and has no affinity to average properly so called." It has further been defined as "the contribution to a general loss".

The term "average" used, then, in a contract of marine insurance, signifies the whole purpose of the contract, namely, averting from the individual adventurer by interposition of the underwriter of all immediate consequences of peril. In other words, it is a rateable contribution to the damage caused to part of the adventure by a common peril.

There are two kinds of average, namely, general and particular.

General average is for a loss incurred, towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole. *Simple* or *particular* average is not a very accurate expression, for it signifies damage incurred by, or for one part of the concern, which that part must bear alone; so that, in fact, it is no average at all. However, the expression is, perhaps, sufficiently understood and received into common use. For instance, the loss of a cable or anchor, etc., are matters of simple or particular average, for which the ship alone is liable. Assuming a cargo of wine turns sour on a voyage, it would be a matter of simple average, which the goods alone must bear, and there might be a general average, for each would be severally liable under a misfortune happening to both ship and cargo at the same time, and from a common cause; as, for instance, if a waterspout should fall upon a cargo of fruit, and a plank from the same violence should be loosened at the same time.

General average is that loss to which contribution must be made by both ship and cargo; the loss, or expense which the loss creates,

being incurred for the common benefit of both. Under maritime policies of insurance, in the ordinary form, underwriters are responsible for the contributions made by the insured, subject for loss by jettison of cargo, anchor, sails, expenses for temporary repairs, loss of cables, etc.—the general rule being that the amount made good in respect of property sacrificed is brought in as contributing rateably with the property saved, and the first named pays the same proportion of general average as the latter.

"The general contribution that is to be made by all parties towards a loss sustained by one for the benefit of all is sometimes called by the name of *general average*, to distinguish it from *special* or *particular* average—a very incorrect expression, used to denote every kind of partial loss happening either to ship or cargo from any cause whatever, and sometimes by the name of gross average, to distinguish it from the *customary average* mentioned in bills of lading, which latter species is also sometimes called *petty average*."

The liability of the goods saved to contribute proportionally with the rest to general average and salvage in no way depends upon the policy of insurance. "It is a consequence of the perils

of the sea, first imposed, as regards general average, by the Rhodian Law many centuries before insurance was known at all, and in reference to salvage by the maritime law, not so early, but at least long before any policies of insurance *in the present form* were thought of." If the owner of a ship has insured it, and it becomes so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, such owner may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so.

The parties to a policy of insurance on a ship tacitly agree, in case of repairs fairly executed, to replace damage occasioned by one of the underwritten perils to a ship of the age and character to which the custom applies, the custom being that the loss shall be estimated at two-thirds of the cost of the repairs, neither more nor less. Obviously, this can very seldom be the accurate measure of the loss. In most cases the rule operates favourably for the underwriter, as the shipowner in spending money on repairs seldom benefits his ship to the extent of one-third, and in such cases the payment of the sum so fixed by custom falls short of

a perfect indemnity. In some cases the benefit to the ship exceeds one-third, and there the assured receives more than a perfect indemnity. But if it were lawful to open the question and depart from the rule in any case, the whole object of it, which is to avoid litigation and expense, would be frustrated. No authority exists for any qualification of the general rule.

If the rule is applicable, two-thirds of the expenses of repairing the sea damage are to be charged to the ship. The expenses of making additions to the ship are not of course to be charged; they are not in any way a consequence of the perils of the sea. Apparently, more than the subscribed amount may be recovered where there are successive losses, but cases of this nature must undoubtedly be *supported* by evidence of inveterate practice.[1]

Be this as it may, "the liability of insurers in a *single loss* is without question limited to the amount insured, and the expense of suing, etc." Moreover, in a policy of marine insurance general average and salvage do not come either within the words or the object of the suing and labouring clause. "The words of the clause are that in case of any misfortune it shall be

[1] See Phillips on *Insurance*, sec. 1,743, quoted by Lord Blackburne in *Aitchison* v. *Lohre*, 4 App. Cas. 879, p. 763.

lawful 'for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of' the subject of insurance, 'without prejudice to this insurance, to the charges whereof we the insurers will contribute'."

The object of this is to encourage and induce the assured to exert themselves, and, in consequence, the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents. It may be here incidentally mentioned that there have been very few cases in our courts in which it has become necessary to discuss the nature of the suing and labouring clause. It should, too, be particularly noted that the suing and labouring clause in a policy of marine insurance is inserted by the underwriters for the purpose of securing the benefit of any pains that the shipowner might be inclined to take in preserving, for their benefit, as much as he possibly could preserve.

Money paid in advance by a charterer or shipper of goods is not in strictness freight ; it has been called more properly "the price of the privilege of putting the goods on board the ship

to be conveyed to their place of destination;" but great latitude is allowed in describing the interest in a policy of insurance, provided that the nature of it is intelligibly disclosed, and there seems no reason why the money advanced may not be insured as freight as well as the money to grow due on the charter, which is undoubtedly insurable as freight, although not properly freight, and rather the price of the hire of the ship. "Money advanced on account of freight" does not necessarily indicate that the insurance is effected by the charterer or shipper, and that the freight paid in advance is at his risk, not at the risk of the shipowner. If this be a fact, and a fact material for the defendant, he ought to raise the question by some plea to that effect.

Assuming that there is, by a policy of marine insurance, an express contract that the underwriters shall be liable for general average, an alleged usage cannot be set up as a bar to the action, for it is entirely in derogation and contradiction of the written contract. Usage may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade; and a usage, consistent with a written contract, may be introduced into it, as both parties, being aware of it, may be supposed to intend that it shall form part of

their bargain. But to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principle, and has been forbidden as often as the attempt has been made.

A defendant cannot, in an action on a policy in the usual form on ship, boats, etc., set up a usage that under such a policy the underwriters cannot be called upon to pay for the loss of *boats* slung on the outside of the ship upon the quarter. Lord Lyndhurst once said: "It was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used." Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.

In reference to the question whether contribution must be claimed in the first instance from the parties concerned, it may be stated that it is not a condition that the assured or goods must claim contribution by the other parties for a jettison before he can demand indemnity from his underwriters; he may demand it of them in the first instance. There is a remedy against the owners of the ship and

the remainder of the cargo, if they ultimately arrive safely at their destination, for part of the loss; but this does not affect the plaintiffs' right against the underwriters, who will then be entitled to stand in their place, and recover contributions from the other parties who are liable. Moreover, if the vessel or any part of the cargo arrived safely in consequence of the jettison, the owners must contribute to the loss sustained by the owners of the goods so sacrificed for the general advantage. The result is that the owner has two remedies—one for the whole value of the goods against the underwriters, the other for a contribution in case the vessel arrives safely in port, and he may avail himself of which he pleases, though he cannot retain the proceeds of both, so as to be repaid the value of the loss twice over. This is the usual case where there is an insurance, and a loss following therefrom within its terms, which would be total but for the liability of a third person. This was decided in the case of *Randall* v. *Cochrane*.[1] In that case a vessel had been taken by the Spaniards, and the underwriters had paid as for a total loss. Reprisals having been made, the commissioners who were appointed to indemnify those who had

[1] Ves. Sen., 98.

sustained losses refused to entertain a claim made by the underwriters, but the assured having obtained from them a contribution over again towards their loss, the underwriters filed a bill, and it was held, not that the loss was *not* total, but that the underwriters having indemnified the assured, whatever the assured received from the commissioners must be held by them as trustees for the underwriters. If the assured proceeds against the underwriters in the first instance, the latter cannot avail themselves by way of plea of the fact that the assured has a distinct right against some other person. They must pay the amount fixed in the first instance, and will then be entitled to use the name of the assured, and proceed against the other parties who are liable.

Questions of this kind have arisen in many forms, and always have been decided the same way. In short, when the assured have made a contract with the underwriters that they shall be paid the sum insured in certain events which have happened, they are entitled to look to that contract for their indemnification independently of their other rights.

CHAPTER II.

Lender upon *Respondentia* not Liable to Average Losses—Case of the *Bella Leandra*—English Underwriters Bound by Foreign Adjustment—English and American Law in reference to General Average Loss or Contribution—Particular Average Loss or Total Loss—English Policies must be Construed according to English Rules of Construction—Underwriters and Merchants with respect to Foreign Adjustment — General Average Adjustment — Meaning of words "General Average" in ordinary English Policy—Little Information on Question as to when Voyage Terminated at an Intermediate Port — Where Adjustment is to take place at Port of Ultimate Destination—Principle on which Loss to Individual is Based—Question of Value of Goods Jettisoned—Amount of Contribution must depend upon Actual Value of Goods—English Contract Governed by English Law—What Obligation to Contribute depends on—Where Average to be Adjusted at Place of Destination—Jettison where there are several Shippers whose Goods belong entirely to Subjects of Country at which Ship has Arrived—Owner of British Ship may avail himself of Statement of Average made in Foreign Country — What a General Average Adjuster ought to Exclude—What the words "General Average as per Foreign Adjustment" signify—Assured not at liberty to Approbate or Reprobate with respect to Foreign Adjustment.

By the law of England, a lender upon *respondentia* is not liable to average losses, but is entitled to receive the whole sum advanced,

provided ship and cargo arrive at the port of destination. In one case, the plaintiffs (merchants in London) had insured with the defendants (underwriters in London) by a policy dated the 23rd July, 1867, a cargo of rye on board the Italian vessel the *Bella Leandra*, on a voyage from Taganrog to Bremen. The vessel, after sailing on the voyage insured, was compelled by severe weather to put into Constantinople in distress, and the master there, in order to raise money necessary for repairs, so as to enable the ship to continue her voyage, executed a bottomry bond on the ship, freight and cargo, to secure the repayment of £2,353 4s. on the arrival at Bremen. The ship having sailed from Constantinople, was compelled, by further severe weather, to put into Malta in distress, and the master was there obliged to execute another and similar bottomry bond on ship, freight and cargo, to secure repayment at Bremen of £465 6s. 5d. The vessel arrived at Bremen, and the captain was unable to take up either bond. Messrs. ——, who had become owners by purchase of the cargo of rye, took up both bonds, and in order to obtain delivery of the cargo, paid off the owners of both. This was found by the case to be the only course by which the Messrs. —— could obtain posses-

sion of the cargo. The special case then found that "a statement of average," dated the 3rd August, 1868, was prepared by an average stater in Bremen, in which the loss arising upon the said bottomry bonds was apportioned between the cargo and the ship and freight and the cargo as follows: £1,088 14s. 11d. as falling upon the cargo, and £1,185 11s. upon the ship and freight. It was held that the underwriters were bound by the average statements so made, and, consequently, that the assured were entitled to recover the £663 2s. 10d.

It is clearly established that upon a policy on an insured voyage to terminate at a foreign port, English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made. They are bound, although the contributions are apportioned between the different interests in a manner different from the English mode, or though matters are brought into, or omitted from, general average, which would not be so treated in England; and underwriters, if they are not absolutely bound to accept the foreign adjustment as rightly made, if *bona fide* made, must assume it to be rightly made, if *bona fide* made, until the contrary be clearly proved. "When a general average is fairly

stated in a foreign port, and the assured is obliged to pay his portion of it, he may recover the amount from the insurer, *though the average may have been settled differently from what it would have been at the home port.*" Moreover, "the *lex loci* is that underwriters shall reimburse general averages if within the perils insured against, *according to the apportionments made and contributions exacted abroad at the port of destination.*"

According to English and American law, the underwriter of a policy in the ordinary form is *not* liable to indemnify against any general average loss or contribution, whether it be general according to the law of his own country or according to the law of the foreign country in which the voyage terminates, or whether the adjustment be made according to the domestic or to the foreign law, if the general average loss be not incurred, or the general average contribution be not made, in order to avert loss by a peril insured against. "Underwriters are liable to make indemnity by payment of either a particular or general average or total loss *only in case of its being caused by the perils insured against.*"

Obviously, this must be so in case of a particular average loss or a total loss. And a

general average loss, as meaning the loss to the person who suffers damage, is no more than a particular average loss to each of the parties who has to suffer or contribute in respect of it. By the word *general* is only meant that the loss is only to be generally distributed, or the contribution to be generally made by all. It is the loss to each and all caused by a sea peril which must in this, as in other cases, be the loss caused by a peril insured against. "So far as general average is occasioned by perils insured against, the insurers are liable for it in proportion to the amount insured. Mr. Justice Story says: "General average is only payable where it is a consequence, or result or incident of some peril insured against."

English policies must be construed according to English rules of construction; and among those rules are two: first, that the court must, if possible, give some effect to words apparently used as words of obligation in a written instrument made between parties; and the other, that the words are rather to be construed so as to impose a burden on the person who apparently assumes them as obligatory.

Underwriters and merchants know well that there is a diversity in the effect of foreign adjustments. No doubt it is competent to an

underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state as if it had been made in and by a subject of the foreign state. A claim for average contribution is part of the law of the sea. The obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not. The fact of a party being insured can have no influence upon the adjustment of general average, as the rules are entirely independent of insurance. If a contributing party is insured, he can claim an indemnity in respect of the contribution which he has been compelled to pay in general average, but that is all. In some cases, however, an assured may have a right to recover in full for the loss of sacrificed property, but the underwriters have the right to recover contribution from the various contributories, and, subject to certain differences of values, the result to the underwriters should be practically the same as if the assured had only claimed his contribution from them. The contribution is based on the benefit derived from the sacrifice by each interest, in other words, on the values saved, and in the case of freight this is the amount of freight at risk, less the

expenses of earning it, which would have been saved if the ship had been lost. Now, this net amount of freight is *not* the amount of freight which the underwriters on freight would have to pay if the ship had been lost, because they would have to pay the gross amount insured without deducting any cost of earning it, which would have been saved if the ship had been lost.

General Average Adjustment.—The words "general average as per foreign statement," the usual memorandum contained in a marine policy of insurance, only make the underwriter liable in respect of a contribution which the cargo owner has to pay to such a general average loss by foreign law, but, except to that extent, does not make him liable in respect of any loss that would not be according to English law, general average. What is general average is to be determined as per foreign statement, that is as a foreign average adjuster would state it. It is an impossibility to adopt the foreign rule as to what the cargo owner was to contribute, and exclude it as to other matters.

As we have pointed out above, long before a policy of insurance was thought of, by the law of the Rhodian Republic it was laid down that where there was a common adventure of the

property of several, if it became necessary, in consequence of perils of the sea, purposely and intentionally to sacrifice part of the property adventured for the preservation of the rest, the owners of the property preserved should contribute to the loss of the owner of that which was so sacrificed for the common benefit. This law has since been adopted in the code of every civilised country ; but, unfortunately, there has been a difference in different countries as to what ought to be considered a sacrifice for the common benefit, and, consequently, a general average loss. The law of England does not consider, when a stress of canvas is put on to avoid a leeshore, and the ship is thereby strained, and water gets in to the damage of the cargo, that there is any intentional sacrifice made of part of the property imperilled for the good of the common adventure. It seems that according to the law of France and at Constantinople this would be a general average loss, though by English law it would not.

In an ordinary English policy the words "general average" would refer to that which was, according to English law, a sacrifice for the general good. Inconveniences may arise in this respect, because, when vessels are bound to a foreign country it frequently happens that

the ship and cargo are taken possession of by a foreign Court of Admiralty, and the adjustment of average takes place according to the foreign law. It is a question that has never distinctly been settled whether, under an ordinary English policy, in such cases the English underwriter could be compelled to bear what was held to be a general average loss by the law of the foreign country; and, therefore, to avoid this difficulty, express clauses have been inserted in policies. Some of such clauses have been framed on the footing that when the vessel was caught in a foreign country, and contributions had to be paid, the underwriters should bear those payments.

Suppose cargo belongs to two owners, the plaintiff and another, and damage has been done to that part belonging to the other owner, the plaintiff's part of the cargo would have to contribute according to French law. Such a case would come within the terms "general average as per foreign statement," and the underwriters must bear the loss. In fine, the meaning of the words "general average as per foreign statement" is that although average is not to be recoverable unless general, what is general average is to be determined by the rules of the foreign law.

There is very little information to be obtained upon the question what circumstances terminate a voyage at an intermediate port, when the ship with part of her cargo on board arrives at her port of original discharge. In *Fletcher* v. *Alexander*[1] the court was asked to decide the principle by which the average stater was to be governed in estimating the general average contribution to be paid by the shipowner to the owner of the cargo in respect of jettisoned goods (salt). Two principles were suggested in argument on the part of the plaintiff: first, that the average stater should take the value of the goods at the port of destination; or secondly, the invoice price, plus the freight, shipping charges and premiums of insurance. The defendant, on the other hand, insisted that the proper estimate was the value of the goods at the port of adjustment. Bovill, C.J., adopted the defendant's view, and not either of those suggested by the plaintiff. The general principle is where the goods of one are sacrificed for the general safety of the whole, all are to contribute according to the benefit they severally derive therefrom. "In the case of jettison (that is, where the goods of a particular merchant are thrown overboard in a

[1] *L.R.*, 3 *C.P.*, 375.

storm, which may be lawfully done to save the ship from sinking); or where the masts, cables, anchors, or other furniture of the ship are cut away or destroyed for the preservation of the whole; or where salvage is paid to re-captors, or money or goods are given as a composition to pirates to save the rest; or where a ransom (when that was legal) was agreed to be paid to an enemy or pirate for liberating the ship; or an expense is incurred in reclaiming her, or defending a suit in a foreign Court of Admiralty, and obtaining her discharge from an unjust capture or detention; in these and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense fairly and *bona fide* incurred to prevent a total loss or some great disaster, such sacrifice or expense is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight and cargo, so that the loss may fall equally on all."

The general principle thus stated is acted upon in all courts and in all countries; but in its application different countries have adopted different rules. What rule, then, is to prevail where a ship has started on a voyage from one country to another, and, a jettison having taken place, the voyage has been brought to

an end before her arrival at her port of destination?

Now, where the adjustment is to take place at the port of ultimate destination there appears to be no doubt as to the application of the principle upon which the estimate is to be made, for "in cases of general average the things saved contribute, not according to the prime cost, but according to the price for which they may be sold at the time of settling the average". With reference to the adjustment at the port of destination, where the goods are delivered and freight earned, the goods are taken at their value at that place, including the freight. If, however, after the jettison or the matter which is the subject of average has arisen, and the remainder of the goods are totally lost, and no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed.

The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand, and the benefit derived on the other. In the case of *Fletcher* v. *Alexander*, the adventure then in progress, the vessel, in consequence of the damage she had

sustained, put back to Liverpool. The ship might have been repaired, and might have prosecuted her voyage and completed the adventure. A large portion of the cargo, however, had been thrown overboard. The greater part of that which was brought to Liverpool was damaged and not fit to be forwarded. The charterers, who had paid a large sum for freight, did not think fit to forward it. The ship was otherwise employed, and the voyage was broken up at Liverpool at the time and under the circumstances stated in the case. Liverpool, therefore, was the place at which the average contribution was to be adjusted, and the time for adjustment was on the arrival of the vessel at Liverpool. The adjustment must, then, in that case, be according to the law of England, and it seemed to the learned judge that the value must be determined at Liverpool.

In dealing with the question in respect of the value at which the goods jettisoned are to contribute, the ultimate place of destination has, seemingly, no application.

The amount of contribution must depend on the *actual* value of the goods jettisoned. The rules as to contribution and adjustment depend upon the probable state of things at, and have reference to, the time and place of adjust-

ment, that is to say, when and where the adjustment ought to take place. If the goods jettisoned were in such a condition that they would in all probability have arrived undamaged at the place of adjustment, apparently, there is no reason why their value at the time of the jettison should not be taken.

An English contract (as stated above) must be governed in point of construction by the law of England, unless the parties are to be understood as having contracted on the foot of some other known general usage amongst merchants relative to the same subject and shown to have obtained in the country where, by the terms of the contract, the adventure is made to determine, and where a general average (if such, by reason of the events of the voyage, be claimed), would, of course, come to be demandable. The general average, to which alone the underwriters' indemnity is confined, is general average as understood by the law of England.

The obligation to contribute depends not so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract as between the parties to the contract. Many variations there are, however, in the laws

and usages of different nations as to the losses that are considered to fall within the principle of general average. But on one point all agree, namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo; and it seems that they are all agreed on another point, namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them shall be either paid or secured to his satisfaction. This appears to be the case in *Russia*.

The next question to consider is, if the average is to be adjusted at the place of destination, by what law shall it be adjusted?

Where there are several shippers, even if all are British subjects, obviously it will in the case of jettison be for the interest of the person whose goods have been lost that the master should exercise his power of detention in order that the expense and inconvenience and delay of actions and suits may be avoided.

Now, if the goods belong entirely to the subjects of the country at the port of which the ship has arrived, they cannot with any reason complain of an adjustment made under the authority of their own law. In a case of this nature it could hardly be contended that

as between them and their master, or between some and others of them, the adjustment ought to be regulated by any other law than their own; for assuming that the goods belong to persons of different nations, the adjustment must be made either according to some one law regulating the whole, or it must be made in parts, according to as many different laws as there happen to be persons of different nations concerned in the adventure. In this case, also, the law of the country must prevail, for it will not impugn any known doctrine or rule of the English law. The shipper of goods tacitly, *if not expressly*, assents to general average, as a known maritime usage, which may according to the events of the voyage be either beneficial or disadvantageous to him. By assenting to general average he must be understood also to assent to its adjustment, and to its adjustment at the usual and proper place; and further, he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made. This is, of course, in a case depending upon general rules and reason, and not upon a special or particular contract. It is hardly necessary to point out to our readers that it is of the greatest importance to maritime commerce

that its regulations should be as simple and as few in number as general justice will permit. "The wisest and most equitable rules may occasionally, in a particular case, be productive of an inconvenience, but such occasional and particular inconvenience is a much less evil than the confusion and uncertainty that never fail to accompany a multiplicity of minute regu lations."

The owner of a *British* ship may avail himself of a statement of average made in a foreign country, so as to charge shippers of goods or a freighter under an agreement for charter entered into in this country, with the expenses of wages and provisions included in such statement of average, according to the practice of the foreign country where it was made. In other words, under a charter made in England, the owner of a British ship may avail himself of a statement which sets forth the expenses of wages and provisions for the seamen incurred during the necessary detention of the ship at an intermediate port, although by the law of this country such expenses would not be recoverable as average.

The Courts of Holland have held that, although a bill of lading contains a clause making a shipowner not responsible for loss or damage

caused by the stranding of a vessel where that stranding was brought about by negligence, the shipowner cannot claim from the cargo-owners any contribution for general average. But if this point had arisen in this country it would have been decided that the cargo-owners would be liable for the contribution in general average under circumstances where the action has occurred through negligence, but where by the bills of lading the owners of the ship were not responsible for that negligence. Indirectly, the contract of carriage does vary the position of the parties with regard to the general average, because it varies the risks which the general interests are exposed to.

The operation of saving is taken for the benefit of both the ship and the cargo, the freight standing in the same position as the ship; and, therefore, the captain—who at this time, under ordinary circumstances, acts as agent for the person whose property is at risk, and spends money on behalf of all who are interested—and all who are interested must contribute to it; therefore the shipowner ought only to contribute so much, and then the underwriters who have indemnified have got to recoup him what he has paid.

"A general average adjuster ought to exclude

claims for partial losses not incurred for more parties than one, and claims under the suing and labouring clause for saving the ship alone. But he must decide what expenses, alleged to have been incurred for the benefit of both ship and cargo, are to be treated as general average expenses, and what are not ; and expenses which are treated by him as general average expenses must be so treated not only as between the respective owners of ship and cargo, but also as between them and their respective underwriters. Expenses so treated cannot be treated as something else by those who have agreed to be bound by his decision." [1]

It was stated in that case by Smith, L.J., that the clause in a marine policy "general average as per foreign statement" meant that in case of a loss giving rise to general average, items of expenditure were to contribute to general average according to *Dutch law*, and that this excluded the view that such items were to be particular average according to *English law*. He meant to the suing and labouring clause.

Again, the assured is not "at liberty to approbate and reprobate, to take the benefit of the foreign law in claiming general average in

[1] Per Lindley, L.J., in the *Mary Thomas*, *L.R.P.*, 1894, pp. 123, 124.

accordance with it, and repudiate the foreign adjuster's award for the purpose of claiming particular average against his insurer upon an adjustment made by an English average stater."

CHAPTER III.

Case of *Hendricks* v. *Australasian Insurance Company*—Master of Ship no Right to insist upon Arbitrary Payment—Shipowner who requires Consignee to Enter into Bond—Person Receiving Goods in pursuance of a Bill of Lading—Consignee who is the Absolute Owner of Goods Liable to Pay General Average—To avoid inconvenience of Resorting to Consignor—Expenditure not Incurred by Master as Agent of Shipowner—When Defendant does not become Liable to Pay any Contribution—What "General Average" means in Insurance Law—Captain of Ship in Cases of Need entitled to incur Extraordinary Expenditure—Case of *Notara* v. *Henderson*—When Extraordinary Expenses are Charged as a matter of Practice.

IN the case of *Hendricks* v. *Australasian Insurance Company*,[1] the question was whether the defendants were bound to pay a particular average loss upon an insurance effected with them in these terms: "*To cover only the risks excepted by the clause 'warranted free from particular average, unless the vessel be stranded, sunk or burnt'. To pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland; being warranted free from particular average unless*

[1] *L.R.* 9, *C.P.* 460.

amounting to 10 per cent. on each series." A policy of this nature is to be construed as if it had stood alone. Whether the words do or do not imply the existence of another policy effected on the same goods is *quite immaterial;* such other policy, if there be one, not being so incorporated into the policy sued on as to affect this contract. If the words had stopped at "stranded, sunk or burnt," it would not be a loss within the terms of the policy sued on. The policy then would have covered only the risks excepted by the well-known clause in English policies, and the only claim the assured will have will be particular average where there has been a stranding, sinking or burning. The words "*to pay all claims and losses on Dutch terms, and according to statement made up by official dispacheur in Holland,*" will have no meaning unless they are incorporated with, and govern the interpretation of, the earlier words. The whole of the sentence must be read together. Again, the words in a bill of lading, "*average, if any, is to be adjusted according to British custom,*" have, in one case, been held to mean that whether or not the loss was, according to the general law of England, the subject of general average contribution, plaintiff, by the terms of the bill of lading, had

made the admitted practice of average adjusters part of the contract, and he was bound by it although erroneous.[1] Moreover, where the policy declared does not refer to or incorporate any other policy, it is to be construed as if there had been no other policy in existence.

The master of a vessel has no right to insist upon payment of an arbitrary sum without furnishing the necessary account or particulars to enable the owner to ascertain how this amount became due. If the master refused to furnish such particulars, so as to enable the plaintiff to ascertain the extent of the defendant's lien, he is guilty of a breach of duty within the terms of section 6 of the Admiralty Court Act, 1861. But if, after giving all proper information, the master were to say: "You must either pay the amount which I demand from you, or you must pay the right sum," the owner of the cargo could not insist upon paying the amount into a bank in the name of persons other than the shipowner, but must pay him either the amount demanded, or tender that which he (the consignee), believes to be reasonable. If, however, the master had said that, whatever might be the amount of the sum

[1] See *Stewart* v. *West India and Pacific Steamship Company*, *L.R.* 8, *Q.B.* 88, 362.

tendered by the consignee, he would accept nothing but a particular security, then the question would arise whether the security which he demanded was a reasonable one. "If he (the captain), says that he will only accept a deposit of 10 per cent. on the value of the goods, this as a general rule would be only unreasonable."

Take the case of salvage. The ship is in distress and is succoured by salvors, and the master makes a compromise with them for the payment of a large sum, and it may turn out upon the final settlement that a large part of the salvage will fall on the shipowner, and yet, under the terms of the bond, the master is to be at liberty to take the whole amount of the salvage out of the deposit, the only security for the payment of what ought to be returned being the credit of the shipowner.

If the shipowner requires the consignee to enter into a bond in particular terms, the question arises whether the bond is unreasonable, and if part of what is insisted upon is unreasonable, the whole instrument is unreasonable.

It is undoubtedly true that if a person receives goods in pursuance of a bill of lading, in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication engages to pay freight, and so he would to pay

general average, *if they were mentioned in the bill of lading*. The master has a lien on the goods for general average, and if he had exercised that right, and informed the defendant that if he took the goods he must pay the general average, and if the defendant after such notice had taken the goods, there would then have been an implied, if not an express contract on his part to pay it. The law, however, will *not* imply a contract from the mere fact of knowledge that the goods were subject to a charge, unless it were accompanied with notice from the shipowner that he would insist on his right of lien. If there is any established usage that a consignee shall pay general average there must be evidence of an agreement on the part of the defendant to pay. Moreover, for a defendant to pay general average in one case it is not sufficient evidence to raise by implication a promise to pay in every case.

A consignee who is the absolute owner of the goods, is liable to pay general average, because the law throws upon him that liability. But a *mere* consignee, who is *not* the owner is *not* liable, unless *before* he receives them he is informed by the shipowner or the master that if he (the master) takes them he must pay it. A consignee by taking the goods adopts the

contract, *i.e.*, the contract in the bill of lading, the terms of which are: "The master agrees with the shipper to deliver the goods to the consignee, he paying demurrage and freight". It should also be particularly borne in mind that the law will *not imply* a contract to pay general average because the defendant, before he received the goods, knew that they were subject to it. There must be an *express* contract to pay general average.

To prevent the inconvenience of resorting to the consignor, he may insert in the bill of lading an express clause that the goods shall be delivered to the consignee, he paying general average; or he may insist on his right of lien and refuse to deliver unless the consignee pays or agrees to pay it. The shipowner's parting with his lien on the goods may be a good consideration for an express promise by the consignee to pay general average, but does not raise any implied contract to pay it, even though the consignee has notice that a general average has been incurred. "The cases in which a mere consignee, not the owner of goods, has been held liable to freight or demurrage proceed on the ground that his acceptance of the goods in pursuance of a bill of lading, whereby the shipper has expressly made the

payment of freight or demurrage a condition precedent to their delivery, is evidence of a contract by the consignee to pay such demand." The earliest case on the subject is that of *Roberts* v. *Holt*,[1] where it was held to be a good custom that if a merchant in Ireland consign goods to a merchant in London, and the master *sign a bill of lading*, the merchant here shall be liable for freight.

Expenditure not incurred on behalf of the master, as agent of the shipowner, for the purpose of performing his contract to carry on the cargo to its destination and earn freight is an extraordinary expenditure for the purpose of saving the property at risk; but if the expenditure had been for the purpose of saving the whole venture—ship as well as cargo—it would constitute a general average, to which the owners of each part of the property saved must have contributed rateably, and the captain, and the plaintiff as his agent, has a lien or right to retain each part of the property saved till the amount of the contribution due in respect of it is paid or secured. But this right will only be in respect of the contribution due in respect of that part. He will have no lien on the cargo for the contribution due, if any, in respect of the hull.

[1] 2 Show 615.

A defendant does not become liable to pay any contribution merely by the receipt of the goods, unless there was a promise, express or implied, to pay it in consideration of the person who had a right to detain the goods till it was paid or secured, parting with the possession.

In insurance law the phrase "general average" is commonly used to express what is chargeable upon all—ship, cargo and freight—and "particular average," to express a charge against some one thing. "General averages are usually cases of sacrifice for the entire interest at risk in ship, freight and cargo, and hence called 'general'. But a contribution may be by part of those interests where only a part is in peril and benefited by the expenses and sacrifices. Where expense is incurred on divers articles in common, the adjustment is made by an average on the respective articles according to their value."

The captain of a vessel is entitled, in case of need, to incur extraordinary expenses for the protection of a particular article, and in some cases he is compellable to do so. For instance, plaintiffs shipped beans on the defendants' ship, under a bill of lading, to be carried from Alexandria to Glasgow, deliverable to the plaintiffs' order on payment of freight by consignees. At

Liverpool the ship met with damage by collision, and was obliged to put in to repair. The beans were wetted by sea water in consequence of the collision, and the repairs, only taking a few days, there was no time to have taken out the beans, dried and reshipped them; but the plaintiffs being at Liverpool, and hearing of the disaster, objected to the beans being taken on in their then condition, and the defendants' agent proposed to them to receive the beans at Liverpool on payment of the whole freight. The plaintiffs were ready to receive the beans, but refused to pay more than freight *pro rata* to Liverpool; consequently the beans were taken on as they were. Damage from collision was one of the excepted perils. It was decided that the plaintiffs were entitled to recover for the damage to the beans occasioned by their having been carried on in their wet condition; for that the defendants were not justified in taking on goods contrary to the express commands of the shipper, and sacrificing them merely for the purpose of earning the freight.[1] This case, therefore, clearly proves that there is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is

[1] See *Notara* v. *Henderson*, *L.R.* 5, *Q.B.* 346.

necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. For neglect by the master in this respect the shipowner is responsible to the shipper. It may be added that the measure of damages was the amount of extra depreciation in value in consequence of the neglect to dry the beans, after allowing the estimated expense of unshipping, drying and reshipping. As a matter of practice, such expenses are always charged in the adjustment against the articles in respect of which they are incurred. It is not expressly said that there is a lien on the goods for such a particular average, but if the master was bound to make a disbursement for the benefit of the goods, it would be very hard on him if he had no remedy where the goods owner has transferred the property and then become insolvent. Furthermore, damage to cargo caused by salt water does not come within the excepted perils when, by reason of the place in which it is stowed, it is exceptionally liable to such damage

in severe weather. Where the cargo as a whole is landed safely, the shipowner has his ship as she lies, either supposed to be worthless, in which case she will be left where she is, or supposed to be worth something to him, in which case he will be held to spend the money necessary to rescue her on his own account, and for his own purposes only, in which case the expenditure *cannot* be the subject of general average.

CHAPTER IV.

Apportionment of Contribution — The fixed and well-ascertained Rule of Mercantile Law—The Phrases in Decided Cases indicating Cost of Repairs—Principle on which Freight to Contribute to General Average—General Average Losses—Loss arising in consequence of Extraordinary Sacrifices—What constitutes a General Average Loss—Case of *Svensden* v. *Wallace*, the Leading Case on Subject—Judgments of the late Lord Esher and Bowen L.J., in reference to General Average Loss—Common Sea Risk defined—Where thing Destroyed has some Peculiar Condition—No existence of General Average without Intentional Sacrifice—Expression "Hopelessly Lost," what it Signifies—Exception "Fire on Board" in Bill of Lading.

Contribution Apportioned. — What is meant by the *value* of a ship within section 504 of the Merchant Shipping Act, 1854, "is *not the value* which the owner would have set upon his ship; nor is the sum for which the owner may have recently insured his ship the only criterion, although it is one of many criteria, of its value, but under ordinary circumstances, and with the exception of a case where there is no market for a ship of the kind, such value will be taken to be what the ship would have fetched if sold immediately before her loss".

It is a fixed and well-ascertained rule of mercantile law that when a ship is, by the perils of the sea, thrown into such a situation that it requires expenditure to make her a ship again, and if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, or, in other words, if the expense of the necessary repairs of the ship is greater than the value of the ship when repaired, or (which is the same thing, but not, perhaps, so strictly accurate), if a prudent uninsured owner under such circumstances would not repair the ship, then the loss amounts to a "constructive total loss".

There are phrases in some of the decided cases indicating that it should be shown that the cost of repairs must greatly exceed the value of the ship when repaired, and that it must not be a measuring cast. The 514th section of the Merchant Shipping Act, 1854, clearly intends a boon to the shipowner in giving him the power to apply to the court to put a stop to all actions and suits, and have the amount of his liability at once determined, and the claims of the various parties settled by whom they might otherwise be harassed. It is for the benefit of the shipowner obviously that all those actions should be stopped; but where such

actions are brought, the plaintiffs are bound to pay the defendants their costs in actions at law. There can be no claim for interest, as interest is not sanctioned by the Act. Moreover, an order made for payment of money into court is in the nature of a security for the claim, not of liquidated damages.

The principle upon which freight is to contribute in the case of general average is, that but for the recapture, for which the salvage is paid, it would have been lost. Salvage is a compensation to the salvors not merely for the restitution of the property which has been made by them to the prior owners (for that is properly an act of mere justice on their part), but for the risk and hazard incurred by them, and for the beneficial service they have rendered the former owners in rescuing that property from the danger in which it was involved; and the persons to contribute to that salvage are the persons who would have borne the loss had there been no such rescue. The charterer of a vessel is, as it were, a purchaser of the part of the freight, and is liable to lose it by the loss of the ship, and he must, therefore, contribute.

As to general average losses. Now, where the law gives a right it will also give a remedy, and when once the existence of the right is

established, courts of law will adopt a suitable remedy, except under particular circumstances, as where there are no grounds to proceed upon. All ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the shipowner. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred must be paid proportionably by the defendant as general average. "The rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence, in order to avoid dispute, than in necessity; it may often happen that the danger is too urgent to admit of any such deliberation."

All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within the term general average, and must be borne proportionably by all who are interested. No English court has any mission to adapt the English law to the laws of other countries; it has authority only to declare what the law of England is.

"A general average loss may be defined as

a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred for the joint *benefit* of ship and cargo; and in order to entitle the party sustaining such loss to a general average contribution it must appear to have been incurred with a view to the general *safety* of the whole adventure."

The question as to what constitutes a general average loss has been exhaustively discussed in the case of *Svensden* v. *Wallace* by the late Lord Esher (Master of the Rolls), and affirmed by the House of Lords. Lord Esher said in that case, "if there is danger to the preservation of both ship and cargo from destruction if the ship remains at sea, the act of putting into port to repair is an extraordinary act, which may well be called a general average act. If in order to do that act, an expenditure is reasonably incurred, that expenditure is a general average expenditure. If, in order to do that act, towage, pilotage or inward dues must be paid, those expenditures are all and each general average expenditures. When the ship is in the port of distress for repair other acts are often done, and other expenditures are often incurred, which must each be considered. Each of these must be considered as if it were the sole act or expendi-

ture, and also whether it may be treated as a part of another act or expenditure. When the ship is in the port of distress it often happens that the cargo is unloaded and warehoused or otherwise protected, and, if necessary, manipulated; the ship is repaired, the cargo is re-loaded, the ship is taken out to sea and proceeds on her voyage. When the ship and cargo are in the port, both may still be in danger of destruction, or the ship alone, or the cargo alone. If both ship and cargo are in danger it is impossible to conceive, as a fact, that anything which can substantially be called repairs can be done to the ship whilst the cargo is in her. The cargo must then be landed for the safety of both. But the ship alone may be in danger, as for instance, of breaking her back on a falling tide if the cargo be left in her, though the cargo, from its nature, would not be in danger. In such a case the cargo must be landed solely for the safety of the ship. The cargo alone may be in danger, as if the injured ship be on the ground and safe, but the cargo be perishable if wetted; then the cargo must be landed, but solely for the safety of the cargo. Or it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be

in danger, because the injury to the ship cannot be repaired without the removal of the cargo. . . . The landing of the cargo in such a case is upon the hypothesis so necessary a part of the act of taking the ship into port so as to be in a position to be repaired, that such act cannot be said to be usefully completed until the cargo is landed. . . . The cost of unloading has consequently in such case always been allowed as a general average expenditure. Treated in this way, which seems to be a not unreasonable way of treating the case as a matter of business, the allowance of the item is not against the principle of law, and therefore is rightly allowed. When the cargo is landed, it may or may not, according to its own nature or the circumstances of the locality, require to be warehoused or otherwise protected. It may, in consequence of partial damage already suffered, or from its own nature, require for its own safety to be manipulated, as for instance, to be unpacked or dried; but such acts cannot possibly be necessary for the safety or preservation of the ship. She is at the moment safe or unsafe. They cannot be said to be a part of the act of going into port to repair; they have no reference to the act of repairing, or of putting the ship into a position in which she can be repaired. They are, there-

fore, not within the principle. The repairing of the ship has nothing to do with the safety of the cargo. It is done in respect of the ship alone. The re-loading of the cargo and the outward expenses are expenses of acts done when both ship and cargo are safe from existing danger, and are therefore not within the rule. They cannot be said to be a part of the act of placing the ship in a position to be repaired. Unless, therefore, we are bound by authority to hold otherwise, I am of opinion that according to the law of England, when a ship is obliged for the safety of ship and cargo to go into, and goes into, a port of distress in order to repair damage done by sea peril, the expenses of going into port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense. I am of opinion, in the same way and in the same case, that the expenses of warehousing, guarding, or manipulating the cargo, of repairing the ship, of re-loading the cargo, of

taking the ship out of port, of the charges of going out of port, are *not* general average expenses. . . . Warehousing the cargo, re-loading it, going out of port, cannot be said to be parts of the act of taking the ship into port in order to enable her to be repaired. Re-loading the cargo and taking the ship out of port when the ship is repaired cannot be parts of the act of repairing the ship. . . . Where the putting into port for repairs is the necessary consequence of a previous general average sacrifice, the law of England is as elastic in respect of the subsequent acts done and expenses incurred in the port as the American and other laws are stated to be in all cases of a ship necessarily putting into a port of distress to repair. And for that proposition there were, before the decision in *Atwood* v. *Sellar*,[1] many weighty dicta by English authors of authority and English judges, but all which dicta drew a distinction between the going into a port of distress in consequence of a voluntary sacrifice, and in putting into port in consequence of a particular average damage." [The case of *Atwood* v. *Sellar* decides the point that if a vessel goes into a port of refuge by reason of an injury done to her

[1] See 4 *Q.B.D.* 342, and 5 *Q.B.D.* 286.

which is itself the subject of general average, the expenses of warehousing and re-loading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port are also the subject of general average.] "I adopt that distinction because I do not think that we are bound, in the present case, by the decision in *Atwood* v. *Sellar*, and the propriety of that decision with reference to the facts on which it was decided we are not at liberty to question. . . . I have looked carefully into valuable books written by great average staters, but cannot accept their views on either side as authority. No one can study the law successfully without reading them. No one can give judgment without referring to them for valuable aid, but they must not rule the decisions of Courts as by authority."

The late Bowen, L.J., said in the same case: "A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. There is no difference in principle between a mast voluntarily cut away, an extraordinary expenditure voluntarily incurred, and extraordinary loss of time and labour voluntarily accepted,

provided that in each case the sacrifice is made for the common safety in a time of danger. Next, as to the object of general average contribution. It is to indemnify the person making the general average sacrifice against so much of the loss caused directly thereby as does not fall to his own proportionate share. This *pro rata* indemnity will not be complete without including in the calculation expenses which, though not themselves within the definition of voluntary sacrifice, nevertheless are directly caused by a voluntary sacrifice, and must, therefore, be recouped if the loss which the sacrifice causes is to be borne *pro rata*. . . . The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average necessarily depends on the circumstances of each case. Each item of expenditure which is challenged must be considered on its own merits with reference to two tests. The first test is whether such item itself fulfils, as against some or all of the interests . . . the definition of a general average sacrifice ; the second is, whether such item, though not itself a general average sacrifice, is, nevertheless, an expenditure caused or rendered necessary by one. No supposed conveniences of calculation, and no practice of

average adjusters can justify taking one man's money to pay what by law is another man's individual loss." [The law of England on this last point (*irrespective of the law of other countries*), undoubtedly is that when some sacrifice has been made (for example, cutting away masts, etc.), the expenses consequent upon going into port after the danger is over to repair this loss are the subject of general average; because going into port, though there is no imminent danger at the time, yet being rendered necessary by the sacrifice made in imminent danger, stands upon the same footing as the sacrifice itself.] Of course, "exceptional cases[1] may be imagined in which the safety of the ship and cargo, and the safety of the common commercial enterprise, would be almost convertible terms; and with reference to such cases it is possible to conceive that expenses after the ship and cargo were in safety from the sea, might on the ground of a physical danger common to both be brought into general average. But (exceptional cases apart) it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and shipowner. The idea

[1] See *Job* v. *Langton*, 6 *E. & B.* 779, and *Walthew* v. *Mavrojani*, *L.R.* 5, Ex. 116.

of a common commercial adventure, as distinguished from the criterion of common safety from the sea, would lead to the inclusion in general average of, at all events, temporary repairs of the ship caused by particular average loss, and would enable the shipowner to complete his part of the contract of affreightment by means of a money contribution levied perforce upon the cargo owner. The chief English case of note in which language occurs that seems at first sight to favour the notion that a common adventure is the true criterion is *Hall* v. *Janson*,[1] where it was held that the unloading and re-loading of cargo, for the sake of effecting repairs upon the ship, might give rise to a liability to contribution on the part of freight. Since freight perishes, if the voyage is frustrated, it may not have been unreasonable to hold that freight ought to contribute to the expenses incurred in unloading and re-loading a cargo, the unloading of which is solely undertaken for the sake of repairing the ship. This limited proposition, with which alone *Hall* v. *Janson* was concerned, by no means warrants the conclusion that the cargo ought in turn to contribute whenever any expenditure is incurred, not of saving the vessel and its contents, but merely

[1] 4 *E. & B.* 500,

for the sake of prosecuting the voyage. In the subsequent case of *Walthew* v. *Mavrojani* the English doctrine has been re-stated and explained, and the language of the court in *Harrison* v. *Bank of Australasia* is to the same effect. We have been asked on another and a different principle to depart from the strict English theory in favour of port of refuge expenses following upon a particular average loss, upon the ground that they all form part of a continuous operation, the whole of which was contemplated by the captain at the time when he put into port. The intentions of the captain are no doubt material in considering the question whether the act done by him was performed only for the benefit of his ship, or for the common preservation of both ship and cargo. But it does not follow, because his intentions are examinable to this extent, that everything which the captain intended in his own mind to do after common safety should have been attained, also ought to be chargeable to general average. Intentions which go beyond what is needed for common salvation only show that, in addition to intending that which was a general average sacrifice, it was intended further to do something which was not a general average sacrifice, nor directly caused by one.

On such a ground repairs of the ship in port ought themselves to be included, for the captain probably intended these; though he intended them as a means not of saving the cargo, but of earning his own freight. In my opinion the two tests which I have enunciated cannot be qualified or extended so as to embrace any such considerations. . . . In the case of *Plummer* v. *Wildman*[1] the unloading of the cargo, which was necessary for the repairs, was charged to general average, but in that case the repairs, owing to an antecedent sacrifice which necessitated them, were *themselves* held to be general average. In the case of *Hall* v. *Janson* (see above), where the unloading was spoken of as chargeable to general average, the question at issue in the action was as to the liability to contribute not of cargo but of freight. . . . The goods having been landed, there is an end of all danger common to ship and cargo. Items of expenditure subsequently incurred cannot be brought into general average on the ground that they are general average sacrifice in themselves, for the hour of danger and of sacrifice is over. They can only become so chargeable if it can be shown that they are part of the loss which some antecedent act of sacrifice entails.

[1] 3 *M. & S.* 482.

. . . *Prima facie* warehousing the cargo is a charge that ought to be borne by the cargo, which benefits exclusively by it. It may conceivably, in some cases, have been rendered necessary by an antecedent sacrifice, so as to fall within the definition of the loss caused thereby. . . . Re-loading is not an act of sacrifice, for long before it occurs both ship and cargo are safe. Where, for example, a ship has cut away a mast and has put into port to repair the damage so caused, and been compelled, in order to repair this special damage to unload and to re-load the cargo, it may follow, according to the decision in *Atwood* v. *Sellar* (*ante*), that such expenses are all part of the loss involved in the original sacrifice. . . . The principle of law that appears to be the basis of the decision in *Atwood* v. *Sellar* is that a general expenditure directly caused by a general average sacrifice is part of the loss which it entails, and becomes the subject of general average contribution."

A common sea risk may be defined as that which does not require the deliberation of the party to determine whether it shall be incurred or not. It may be here incidentally pointed out that by the law of England the expenditure of ammunition in resisting capture by a privateer,

the damage done to the ship in the combat, and the expense of curing the wounded sailors, are *not* the subject of general average.

Where the thing destroyed has some peculiar condition attached to it, so that it will be lost whether the whole adventure is saved or not, then its destruction cannot be deemed a sacrifice. And where a mast is in such a condition that it must have been lost, whether the vessel got safely into port or not, there can be no sacrifice of it when it was cut away, and the plaintiffs have, therefore, no claim to contribution.

General average cannot exist without an intentional *sacrifice*; but the meaning of the word "sacrifice," and what is comprehended by it is that if anything on board a ship which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. In other words, where, whether the act relied upon as the act of sacrifice has been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to

the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice. Again, to make the meaning of the word "sacrifice" absolutely clear, there is nothing in respect of which a general average contribution can be claimed, if the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to the owner. Conversely, where it is possible to save the mast.[1]

The expression "hopelessly lost" signifies "impossible to be saved." Colloquially, a thing is impossible when, according to the ordinary course of human events, no expectation can be entertained that it will happen. "The property destroyed or abandoned must, in all respects, be considered in the same light as if it had been saved, and its value must be estimated accordingly; and, therefore, where the thing said to have been voluntarily abandoned or destroyed is in such a state, by reason of a peril peculiar to itself, that if the act of supposed sacrifice had not been done, it would have very shortly been destroyed without the

[1] See *Corry* v. *Coulthard*, unreported, but mentioned in *Shepherd* v. *Kottgen*, 2 *C.P.D.* 583.

rest of the common adventure being lost, the act of slightly hastening the moment of loss is not an act of sacrifice which enables the owner of the thing to claim contribution. There is no act of sacrifice if within a short time the thing would have been lost by a peril peculiar to itself, and independent of the common peril to which the whole adventure is exposed." A bill of lading contained an exception of "fire on board." The defendants carried goods belonging to the plaintiff, and the goods were injured during the voyage in consequence of water used to extinguish a fire which occurred during the voyage. On the true construction of the bill of lading it was made perfectly clear to the Court that the meaning was that their contract as carriers was subjected to the specified exceptions to fire and its consequences, but these exceptions only applied to the defendants as carriers, and did not relieve the shipowners from the liability for general average contribution to the owner of goods damaged by water used in putting out a fire on board.[1]

[1] See *Schmidt* v. *Royal Mail Company*, 1876, 45 *L.J.*, *Q.B.* 646.

CHAPTER V.

The two Conditions necessary in order to make Jettison the subject of General Average—Long continued custom has created Claim called General Average—Where Steam Power substituted for Sailing Power—English Law quite clear where Equipment of Ship is employed for its Ordinary Purpose—Where endeavour made to Float Stranded Steamship—An Imminent Peril must Exist in order to Claim Contribution—Liabilities of Shipowner existing upon Bills of Lading—Where Insurance is upon each Package Separately—Where Armed Forces Board a Ship—Rule of Law that Master may, in Urgent Cases, Sell part of Cargo of Ship—Ship Disabled by Perils of Sea from Pursuing her Voyage—Expenditures—Determination of question of Destructive Total Loss—Services Rendered by getting Ship away from place where she Stranded—Ship going to Sea with Less Hands than she ought to do.

In order to make jettison the subject of a general average contribution two conditions must be fulfilled. First of all, *there must be common danger;* it must be a maritime peril, and it must be common to the whole adventure. And secondly, there must be a sacrifice in the sense of *intentional* sacrifice. That is a second condition which must be fulfilled, "and that seems to exclude all those cases in which the average staters ought to refuse to allow a contribution upon the

ground of wreck." All the writers in this country and abroad appear to be agreed that the question is whether there is *common danger*, and whether there is *voluntary sacrifice*, although they are not all agreed upon the application in practice of these rules; but the one case in which English average staters are agreed is that if a mast were sprung, and a part of it were to go overboard with a quantity of spars and sails attached to it hanging on a stay which must give way in a minute or two, whilst in the meantime, by battering against the side of the vessel it adds to the danger, and if the stay were cut to let it go at once, it would be very difficult to say that there was anything more than wreck. In short, if the danger is common and the thing is voluntarily sacrificed, it is contributed for rateably.

Long continued custom has created the claim called "general average," and to make expenses incurred by the shipowner general average, they must be voluntarily and successfully incurred, or the necessary consequence of a resolution voluntarily and successfully taken by a person in charge of a sea adventure for the safety of the ship and cargo, under the pressure of a danger of total loss or destruction *imminent* and common to them. A shipowner must bear

the loss of his timber being made use of to aid in making up for the deficient coal. Where a rudder has been carried away, and a spare spar has been cut up to make one, it has been decided to be general average. A certainty of destruction within a short time, unless prevented, is an emergency and imminent. Assuming that a vessel ran for shelter into a river where no supplies could be obtained, and assuming she would have to stay a month unless she got out of the then spring tides; and also assuming that all her provisions would fail her in that time, and suppose, to get out, she lightens herself by throwing some heavy cargo overboard, this would constitute a case of emergency and imminent danger, for such is the result of all the authorities.

Where steam power is substituted for sailing power, which from injury to the ship had been exhausted, the additional expense of fuel is not to be deemed an extraordinary expense within the meaning of the rule of general average that it is "a loss arising out of extraordinary sacrifices made or extraordinary expenses incurred for the joint benefit of ship and cargo". The true principle as applicable to cases of general average losses is that "if a vessel goes into port in consequence of an injury which is itself

the subject of general average such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages and provisions during the stay are to be considered as general average; but if the damage was incurred by mere violence of the wind and weather, without sacrifice on the part of the owner for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner to keep his vessel tight, staunch and strong during the voyage for which she is hired".

The English law is quite clear on the point that where the equipment of the ship is employed for its ordinary purpose, though it may be under circumstances requiring unusual demands upon it, there is no sacrifice and no right to general contribution. The shipowner, if he insists that the cargo-owner is bound to contribute in general average, must show that the ship has been in some way injured, that the ship and cargo were both in danger, and that the injury to the ship happened in consequence of an intentional putting her into the danger of injury for the purpose of attempting to save both ship and cargo. As has been before pointed out, the captain of a ship is there to

do what he ought to do for the benefit of both shipowner and cargo-owner, and his duty is to everything he can do to save both ship and cargo. An underwriter can insure himself against the negligence of the master.

If an endeavour is made to refloat a steamship stranded in a position of peril, the engines are intentionally worked for this purpose, at the risk of damage *for the common safety*, the damage so caused to the engines is a general average loss, and the value of the coal consumed in working the engines is also the subject of general average contribution, and this matter, looked at purely from a business standpoint, this use of the engines may be fairly regarded as an extraordinary sacrifice, and there is no law to prevent it from being so regarded. Again, a shipper of cargo is entitled in time of peril to the benefit not only of the best services of the crew in order to save his goods, but of the use of all the appliances for that purpose with which the ship is provided. And therefore, where a ship is fitted up with auxiliary steam pumping power, it is the duty of the owner to make some provision for supplying the engine with fuel. Not that he is bound to have on board enough for every possible emergency, but he is bound to have a reason-

able supply, having regard to the nature of the voyage, the season of the year, the quality of the cargo, the condition of the ship, and what experience has shown to be prudent to provide against under those conditions. If he fails to do so, he cannot call upon the owners of cargo to contribute towards that reasonable supply. "That would be to make them pay for that which he ought to have provided at his own expense, and if under such circumstances the opportunity occurs during a time of peril of buying coals from a passing steamer, he cannot charge their cost as an extraordinary expenditure entitling him to general average."

Again, it must be shown that an imminent peril existed, and that the master deliberately, and for the sake of preserving the adventure, sacrificed that in respect of which contribution is claimed. It constitutes a general average act where the ship has reached her destination, and, in a certain sense, the voyage is over, and where a great deal of the cargo has been unladen, but some considerable quantity still remains on board, and a fire breaks out in the hold, and in order to save the ship and cargo water is poured down, and by pouring down the water the fire was extinguished and the ship was saved. No authority conflicts with

this decision, although formerly such cases were excluded from general average. The practice of average adjusters professes to follow legal principles and authority. But as in former times it seems only to have been a *profession*, nothing more. If the liabilities of the shipowners upon bills of lading are still existing, this shows that the maritime adventure is not at an end; and even where the voyage is at an end and a fire breaks out, and the vessel was discharging her cargo, it has been expressly ruled by Cockburn, C.J., that by the general law the liability to a claim for a general average contribution attaches. To put it in another form: A case of an ordinary maritime adventure, the vessel was in port, and had unloaded a considerable part of her cargo; but a fire had broken out on board, and if it was not checked, there would have been, at all events, a partial destruction of the ship and of the remaining cargo. If she had been scuttled, great damage would have been done to her. The master poured water into her in order to extinguish the fire, a very reasonable step to take; but the cargo was damaged and injury was done to it by water. The law of general average is, as we have pointed out before, subject to certain rules; there must be *danger;* there must be an intent to *sacrifice.* If there

is an imminent danger, and if the captain sacrifices part in order to save the rest of the adventure, a claim for a general average contribution arises. However, mere *bonâ fides* on the part of the captain is not sufficient; it must be shown that "those circumstances did, in fact, exist which give rise to the right of contribution". It is also insufficient to show that complete destruction was *not* imminent. The captain becomes, in extraordinary circumstances, in effect the agent for all parties. Furthermore, when under the pretence of preserving the adventure, the cargo is jettisoned without due course, the owner will have a right of action against the shipowner for the whole of his loss.

Where the insurance is upon each package separately (*e.g.*, a hogshead of sugar separately valued and secured), it is to be treated as a total loss upon each package lost; but when it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no *average* loss, and there cannot, in such a case, be any total loss of a portion only of the cargo.

Assuming that an armed force boards a ship and takes part of the cargo, the underwriters are not liable on a clause which states "the loss to be by seizure by *people* to the plaintiffs

unknown"; for *people* in the policy means the governing power of the country. Where after such a seizure the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered as for general average; but for such part as in consequence of the stranding was damaged and thrown overboard, the insured may recover on a clause stating the loss to be by stranding.[1]

It is a rule of law that a master may in *urgent* cases sell part of the cargo, but such sale raises a promise on the part of the shipowner to repay the merchant the value of the cargo so sold. If the captain could have raised funds for the repairs of a vessel, the defendants in such a case will not be entitled to a claim for general average. "If in the act of jettison, or in order to accomplish it, or in consequence of it other goods in the ship are broken, damaged, or destroyed, the value of these must be included in general average, as also must it be if to avoid impending danger, or to repair the damage caused by a storm, the ship be compelled to take refuge in a port to which it was not destined, and into which it cannot enter without taking out part of its cargo, and the

[1] See *Nesbitt* v. *Lushington*, 4 *T. R.*. 783.

part taken out to lighten the ship happen to be lost, the loss also being occasioned by the removal of the goods for the general benefit, must be repaired by general contribution."

Upon a policy of insurance on goods, where the ship, being disabled by the perils of the sea from pursuing her voyage, was compelled to put into port to repair; and in order to defray the expenses of such repairs, the master having no other means of raising money sold part of the goods, and applied the proceeds in payment of these expenses, it was decided that the underwriter was not answerable for this loss. A person cannot recover the sum of money which he claims as "money had and received," unless he is entitled to freight.

Expenditures.—If anyone is insured in the ordinary form his insurers will have to indemnify him for general average. No more contribution is exigible from the owner of a parcel of goods that is insured than from the owner of a parcel that is not insured. The contract of the shipowner is to carry the goods to their destination, and with perfect accuracy it may be said that "there is no doubt of the power of the master in law (but some as to what extent it goes), to bind the owner. The master is appointed for the purpose of

conducting the navigation of the ship to a favourable termination, and he has as incident to that employment a right to bind his owner for all that is necessary". However, neither the owners of the ship nor their master have authority to bind the goods, or the owners of the goods, by any contract. The master has authority to make for his owners all disbursements which are proper for the general purposes of the voyage, and when once those disbursements are paid for, either by the master out of funds belonging to the owners which the master possesses, or by funds which the owners themselves apply, to discharge a contract which they either could not dispute because the master had bound them to make it or did not choose to dispute, the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average. But there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, *as a matter of law*, to be charged to general average. Nor is it a question of law whether the amount of the sum charged as a disbursement was exorbitant or not.

In determining the question of "destructive

total loss" it is necessary to take into account the liability, if any such existed, of the cargo and freight to make general average contribution towards the expenses of the ship. When the most convenient mode of saving either ship or cargo, or both, is by raising the ship together with the cargo, the expense required for such raising will be an extraordinary expense for the common benefit of both, and the cargo will be liable to a general average contribution towards the expense; and further, the shipowner will have a lien on the cargo to secure the payment of that general average.

Services rendered for getting the ship away from the place where she stranded, and for trouble taken in transhipping the cargo, identifying part of it, and arranging for the sale of another part which could not be identified, such services have nothing in common with general average. The expenses of getting a ship off a sandbank and taking her to a port to be repaired, after the entire cargo has been discharged and in safety, are *not* chargeable to general average, but to particular average alone. Again, we may point out that to constitute general average there must be extraordinary expenses incurred for the joint benefit of ship and cargo. The employment of a steam tug and the cutting of a channel

by which the ship was rescued, cannot be the same operation as the unloading of the cargo.

By the law of England it is quite settled that the expenses of bringing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average. It is not necessary that the damage should be an immediate one to the ship; it is sufficient, in order to charge the underwriters, if the loss happen in consequence of any peril insured against. In the case of a ship ransomed, the loss is the payment of the money; there no actual damage is done to the body of the ship, and yet the insured is liable on his undertaking, Or, if a ship be sunk, and afterwards weighed up, the underwriter would be answerable for any expense incurred in weighing her up, as a consequential damage, though, perhaps, the body of the ship sustained no actual injury. When the freight is lost, the wages are also lost. This rule was founded on a principle of policy; for if sailors were in all events to have their wages, and in times of danger entitled to insist on an extra charge on a promise from the captain to pay them extra wages in consideration of their doing more than the ordinary share of duty in navigating the ship, and he gave way to their demands, this fact might

make them in many cases suffer the ship to sink. Further, an action will not lie where the contract is made on shore, and the extra work is occasioned by the desertion of part of the crew. If a ship goes to sea with less hands than it ought to do, it is dangerous to life, and if so, it is not incumbent on a plaintiff to perform the work, and he is in the condition of a free man. "I do not wish it to be inferred," says Dr. Lushington in one case, "that mariners, having completed the voyage outwards, are compellable to make the return voyage when the number of the crew is so small that risk of life may be incurred." [1]

[1] See the *Ariminta* (*Feran.*), 1 Sp. Ecc. Rep. and Admis., 229.

CHAPTER VI.

Contribution does not arise from any Contract—The two well-established Exceptions to the Rule of Contribution—Good Answer to Claim for Contribution if Ship was Unseaworthy—Case of *Burton* v. *English*—Case of *Anglo-Argentine Live Stock and Produce Agency* v. *Temperley Shipping Company*—Profession or Calling of an Average Stater or Average Adjuster—What Circumstances must be Considered prior to making an Adjustment—Case of *The Brigella*—Question whether Underwriters of Policies on Ship and Freight are liable to pay certain Proportions of certain Expenses incurred by Assured—Interests which Contribute to General Average—Interests which do *not* Contribute to General Average—Latest Case on subject of Particular Average.

CONTRIBUTION "does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved." The principle upon which contribution becomes due does not appear to differ from that upon which

claims of recompense for salvage services are founded. But in any aspect of it the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well-established *exceptions* to the rule of contribution for general average. The first exception is when a person, who otherwise would have been entitled to claim contribution, has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to allow him to recover from those whose goods are saved, although he may be said, in a particular sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He is not entitled, in any sense, to payment for his services, or indemnity for

losses sustained by him, in the endeavour to rescue property which was imperilled by his own wrongful act, and which it was his duty to save.

The second exception is in the case of deck cargo. The reason is obvious why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches. "According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded in the question of the other shippers of cargo as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck, and this exception does not apply either in (1) those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship."

It will be a good answer to a claim for general average if the ship were unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness. There can be no proper jettison from an overladen ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

In a case which came before the Courts of Appeal in 1883 the plaintiffs were timber merchants, and they shipped on the defendants' vessel a cargo of timber, part of which was deck cargo, and also a cargo of iron under different contracts. The ship had been chartered by the plaintiffs, but the goods were shipped under a bill of lading which referred to the charter party. During the voyage part of the deck cargo was jettisoned for the safety of the vessel and rest of the cargo, and an action was brought for general average contribution against the shipowners, and it was contended that they were not liable by reason of a stipulation in the charter party. The ship was not a general ship, but one which took only two cargoes of iron and timber. A clause in the charter party on which the defendants relied was as follows :

"*The steamer shall be provided with a deck load if required at full freight, but at merchants' risk.*" Obviously, this stipulation was in favour of the shipowners, for in order to earn a larger freight they required part of the cargo to be deck cargo, and then it was to be at the merchants' risk. Now, if there were an improper jettison by the master and crew, this stipulation would relieve the shipowners from liability. The general rule is that where there is any doubt as to the construction of any stipulation in a contract, the court ought to construe it strictly against the party in whose favour it has been made. If the liability is in consequence of any act of any of the shipowners' servants for which the shipowner would be liable but for this stipulation, then it follows that the defendants are freed from liability. ". . . This stipulation would cover any act of the master or crew, which, being done by them as servants of the shipowner, would otherwise make him liable. It therefore covers the case of improper jettison; also a loss caused by a collison or stranding owing to the negligence of the master or crew."[1] In theory a claim for contribution arises by reason of a voluntary sacrifice by the cargo-owner for the benefit of the ship

[1] See *Burton* v. *English*, 12 *Q.B.D.* 218.

and cargo, and not from any act done by the shipowner at all. As has been pointed out above, when speaking of contribution, it does not form any part of the contract to carry, nor from any contract at all, but from the old Rhodian Laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of the common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. The liability to contribute, then, does not arise out of any contract at all, and is not covered by the stipulation in the charter party on which the defendants in that case relied. It was decided that the liability to general average contribution was not covered by any words of the contract in the charter party, and that the defendants were liable.

A claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible, "but negligence for which the shipowner is not responsible is as foreign to him as to the person who has suffered by it."

The latest case on the subject of general average that of the *Anglo-Argentine Live Stock*

and Produce Agency v. *Temperley Shipping Company*, is a case which decides that the depreciation of live stock shipped on board a ship for carriage from Buenos Ayres to Deptford was a loss which plaintiffs were entitled to have been made good in general average. The facts of that case were, shortly, as follows: The plaintiffs, in April, 1898, shipped on board the defendants' steamer at Buenos Ayres a deck cargo of sheep and cattle for carriage to Deptford. The contract of carriage stipulated (1) that the steamer should on no account call at any Brazilian or continental ports before landing her live stock; and (2) that average (if any) should be according to the York-Antwerp rules. The reason for the insertion of the first of these stipulations was that by an order made under the provisions of the Diseases of Animals Acts, 1894 and 1896, foreign animals cannot be landed in the United Kingdom if the steamer conveying them has touched at Brazilian or continental ports on her voyage. The loading of the vessel finished on 15th April, and on that day she left Buenos Ayres. On the 20th April it was discovered that the vessel was making water from a leak below the water-line, and for the safety of all concerned the captain put into *Bahia*, arriving there on 27th April. The put-

ting into Bahia was a general average act. Bahia being a Brazilian port, the ultimate landing of the cattle at Deptford was, by this general average act, rendered impossible; and the plaintiffs, having thus lost their English market, acted for the best by making arrangements for the carriage of their cattle to *Antwerp*. The cattle were, accordingly, carried to Antwerp, where they were sold at a much less price than they would have realised if they had been carried to, and delivered at, Deptford. The repairs to the vessel were done at *Bahia* between 27th April and 12th May. On 12th May she sailed for Antwerp, and arrived there on 7th June. The plaintiffs incurred a large loss by reason of their cattle having been rendered incapable of being landed at Deptford. They were also put to the expense of maintaining their cattlemen, and of providing fodder and water for the cattle while at *Bahia*. The questions in that case were whether any, and if so, which of these losses formed the subject of general average contribution, and it was decided as above stated. "Surely the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice, for that would be to say that if a man lost all his property for the common benefit he should receive

nothing, but if he lost a part only, he should receive full compensation." It is the safety of the property and not the voyage which constitutes the true foundation of general average; and, therefore, the fact that the general average act had the effect of putting an end to the voyage is immaterial.

"The profession or calling of an average stater or average adjuster is of comparatively recent origin. The right to receive, and the obligation to make, general average contribution existed long before any class of persons devoted themselves, as their calling, to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons, or, indeed, to employ anyone at all. He might, if he pleased, make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater, it is merely as a matter of business convenience on his part. The average stater is not engaged, nor does he act on behalf of any of the other parties concerned, nor does his statement bind them. It is put forward by the shipowner as representing his view of the

general average rights and obligations; but the statement or adjustment is open to question in every particular by any of the parties who may be called on to contribute." [1]

For the purpose of making an average adjustment, the value of the ship just before the general average sacrifice took place must be taken. The way that value is to be ascertained is, theoretically speaking, the value of the ship at that time. The practical working rule, which appears to have been established in this country by general mercantile practice, is that the value of the ship is to be ascertained by taking the difference between the value of the ship when undamaged and the estimated cost of repairing the particular average damage.

In a case decided in the year 1893 the question was whether or not, where a ship is proceeding in ballast to her loading port under or in pursuance of her charter, and the only persons interested in the ship and chartered freight are the shipowners, there can be any general average loss for which the underwriters are liable under a policy on chartered freight containing the "foreign statement" clause. Now, whichever way it is looked at, the obli-

[1] Per Lord Herschell in *Wavertree Sailing Ship Company* v. *Love* [1897]. App. Cas. at p. 380.

gation to contribute in general average exists between the parties to the adventure, whether they be insured or not. The circumstance of a party being insured can have no influence upon the adjustment of general average, the rules of which, as has been pointed out before, are entirely independent of insurance. Where a contributing party is insured, he can claim an indemnity against the underwriter in respect of the contribution which he has been compelled to pay in general average, but that is all. Bearing in mind, then, that there are some cases in which an assured may have a right to recover in full for the loss of sacrificed property, the underwriters have the right to recover contribution from the various contributories, and, subject to certain differences of values, "the result to the underwriters should be practically the same as if the assured had only claimed his contribution from them, but this exception does not affect the question we are considering. Be it noted that the contribution is based on the benefit derived from the sacrifice of each interest, in other words, on the values saved, and in the case of freight this is the amount of freight at risk, minus the expenses of earning it, which would have been saved if the ship had been lost. This net amount of freight is not

the amount of freight which the underwriters on freight would have to pay if the ship had been lost, because they would have to pay the gross amount insured without deducting any cost of earning it, which would have been saved if the ship had been lost." The final result of that case was that, as the ship was under charter outward bound in ballast to load for the homeward voyage, and as the only persons having any interest in the ship and chartered freight were the shipowners, the expenses in question were not a general average loss for which the defendant could be liable under the policy of chartered homeward freight, and as there was no necessity for any foreign adjustment, the "foreign statement" clause had no effect.[1]

The question whether the underwriters of policies on ship and freight respectively are liable to pay certain proportions of certain expenses incurred by the assured, the shipowners, and said by them to have been incurred in saving the ship and freight respectively, were in a late case treated as general average by a foreign adjuster, and had been apportioned by him between ship, freight and cargo. The proportions allocated to ship and freight respectively had been paid by the underwriters, but

[1] See the *Brigella* [1893], Pp. 189,

the proportion allocated to the cargo could not be recovered from the cargo-owners, and was therefore lost by them. There was a clause in the policy of insurance in these words: "General average and salvage charges payable according to foreign statement, or per York-Antwerp rules, if in accordance with the contract of affreightment". Nothing turned on salvage, nor on the York-Antwerp rules. For the purposes, therefore, of that case the clause might have been read short thus: "General average payable according to foreign statement". It is right and perfectly true to say that "a general average adjuster ought to exclude claims for partial losses not incurred for the benefit of more parties than one, and claims under the suing and labouring clause for saving the ship alone. But he must decide what expenses alleged to have been incurred for the benefit of both ship and cargo are to be treated as general average expenses and what are not, and expenses which are treated by him as general average expenses must be so treated not only as between the respective owners of ship and cargo, but also as between them and their respective underwriters. Expenses so treated cannot be treated as something else

by those who have agreed to be bound by his decision."

There is no authority for plaintiffs to assert that some of the items of expenditure (which have been rightly treated by the foreign adjuster, according to the particular foreign state where the adjustment took place, as general average charges), are particular average charges according to English law, and if there is such authority, obviously the result would be most unjust to the underwriters.[1] An underwriter is liable for general average, so called, not by force of the express words of his contract, but by the force given to it for centuries.

The interests which contribute to general average are the following, namely: gold, silver, and precious stones, and all merchandise put on board for the purposes of traffic which passengers carry but do not have attached to their persons.

Interests which do *not* contribute to general average include seamen's wages and passengers' and crews' provisions.

The latest decision on the subject of particular average is that of the *Alsace Lorraine*.[2]

[1] See the *Mary Thomas*, [1894], p. 108.
[2] [1893], p. 209.

APPENDIX.

GENERAL AVERAGE.

YORK-ANTWERP RULES, 1890.

The following Rules were adopted at the Conferences in connection with the Association for the Reform and Codification of the Law of Nations held at—

ANTWERP, 1887.

RULE I.—JETTISON OF DECK CARGO.

No jettison of deck cargo shall be made good as general average. Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

RULE II.—DAMAGE BY JETTISON.

Damage done to goods or merchandise by water which unavoidably goes down a ship's hatches opened, or other opening made for the purpose of making a jettison, shall be made good as general average in case the loss by jettison is so made good. Damage done by breakage and chafing, or otherwise from derangement of stowage consequent upon a jettison, shall be made good as general average in case the loss by jettison is so made good.

LIVERPOOL, 1890.

RULE I. —JETTISON OF DECK CARGO.

No jettison of deck cargo shall be made good as general average. Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

RULE II. — DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened, or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

ANTWERP (*continued*).

RULE III.—EXTINGUISHING FIRE ON SHIPBOARD.

Damage done to a ship or cargo, and either of them, by water or otherwise, in extinguishing a fire on board the ship, shall be general average, except that no compensation be made for damage done by water to packages which have been on fire.

RULE IV.—CUTTING AWAY WRECK.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, shall not be made good as general average.

RULE V.—VOLUNTARY STRANDING.

When a ship is intentionally run on shore because she is sinking or driving on shore or rocks, no damage caused to the ship, the cargo, and the freight, or any or either of them, by such intentional running on shore shall be made good as general average.

RULE VI.—CARRYING PRESS OF SAIL.

Damage occasioned to a ship or cargo by carrying a press of sail

LIVERPOOL (*continued*).

RULE III.—EXTINGUISHING FIRE ON SHIPBOARD.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage, by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages or cargo, as have been on fire.

RULE IV.—CUTTING AWAY WRECK.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, shall not be made good as general average.

RULE V.—VOLUNTARY STRANDING.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

RULE VI.—CARRYING PRESS OF SAIL — DAMAGE TO OR LOSS OF SAILS.

Damage to or loss of sails and

ANTWERP (*continued*).

shall not be made good as general average.

RULE VII.—PORT OF REFUGE EXPENSES.

When a ship shall have entered a port of refuge under such circumstances that the expenses of entering the port are admissible as general average, and when she shall have sailed thence with her original cargo or a part of it, the corresponding expenses of leaving such port shall likewise be so admitted as general average; and whenever the cost of discharging cargo at such port is admissible as general average, the cost of reloading and stowing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. Except that any portion of the cargo left at such port of refuge, on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, shall not be called on to contribute to such general average.—(See Rule X. on next page.)

RULE VIII.—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE.

When a ship shall have entered a port of refuge under the circum-

LIVERPOOL (*continued*).

spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo and freight, or any of them, by carrying a press of sail, shall be made good as general average.

RULE VII.—DAMAGE TO ENGINES IN REFLOATING A SHIP.

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

RULE VIII.—EXPENSES LIGHTENING A SHIP WHEN ASHORE, AND CONSEQUENT DAMAGE.

When a ship is ashore and, in order to float her, cargo, bunker

ANTWERP (*continued*).

stances defined in Rule VII., the wages and cost of maintenance of the masters and mariners from the time of entering such port until the ship shall have been made ready to proceed upon her voyage, shall be made good as general average. Except that any portion of the cargo left at such ports of refuge on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, shall not be called upon to contribute to such general average.—(See Rule XI.)

RULE IX.—DAMAGE TO CARGO IN DISCHARGING.

Damage done to cargo by discharging it at a port of refuge shall not be admissible as general average in case such cargo shall have been discharged at the place and in the manner customary at that port with ships not in distress.—(See Rule XII.)

RULE X.—CONTRIBUTORY VALUES.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowners' freight

LIVERPOOL (*continued*).

coals and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and re-shipping (if incurred), and the loss or damage sustainad thereby, shall be admitted as general average.

RULE IX.—CARGO, SHIP'S MATERIALS AND STORES BURNT FOR FUEL.

Cargoes, ship's materials and stores, or any of them, necessarily burnt for fuel for the common safety, at a time of peril, shall be admitted as general average, when, and only when, an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner, and credited to the general average.

RULE X.—EXPENSES AT PORT OF REFUGE, ETC.

(*a*) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances, which render that necessary for the common safety, the

ANTWERP (*continued*).

and passage money at a risk of two-fifths of such freight, in lieu of crew's wages, port charges, and all other deductions; deduction being also made, from the value of the property, of all charges incurred in respect thereof subsequently to the arising of the claim to general average.—(See Rule XVII.)

LIVERPOOL (*continued*).

expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return, shall likewise be admitted as general average.

(*b*) The cost of discharging cargo from a ship, whether at a port or place of loading, call or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(*c*) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation, or of the abandonment of the voyage, shall be admitted as general average.

(*d*) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair, or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the

ANTWERP (*continued*).

RULE XI.—LOSS OF FREIGHT.

In every case in which a sacrifice of cargo is made good as general average, the loss of freight (if any) which is caused by such loss of cargo shall likewise be so made good.—(See Rule XV.)

RULE XII.—AMOUNT TO BE MADE GOOD FOR CARGO.

The value to be allowed for goods sacrificed shall be that value which the owner would have received if such goods had not been sacrificed.—(See Rule XVI.)

LIVERPOOL (*continued*).

extra cost of such towage, transhipment and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.—(See Rule VII.)

RULE XI.—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, ETC.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs mentioned in Rule X., the wages payable to the master, officers and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed on her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed upon her original voyage, the wages and maintenance of the master, officers and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.—(See Rule VIII.)

RULE XII.—DAMAGE TO CARGO IN DISCHARGING, ETC.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.—(See Rule IX.)

LIVERPOOL (*continued*).

RULE XIII.—DEDUCTIONS FROM COSTS OF REPAIRS.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," *viz.* :—

In the case of iron or steel ships, from date of original register to the date of accident:

Up to 1 *year old* (*A*).—All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.

Between 1 *and* 3 *years* (*B*).—One-third to be deducted off repairs to and renewal of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full.

Between 3 *and* 6 *years* (*C*).—Deductions as above under Clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery (inclusive of boilers and their mountings).

Between 6 *and* 10 *years* (*D*).—Deductions as above under Clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets and rigging.

LIVERPOOL (*continued*).

Between 10 *and* 15 *years* (*E*).—One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.

Over 15 *years* (*F*).—One-third to be deducted of all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.

Generally (*G*). — The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of wooden or composite ships :—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions :—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

LIVERPOOL (*continued*).

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of ships generally :—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages, and graving dock materials, shall be allowed in full.

RULE XIV.—TEMPORARY REPAIRS.

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

RULE XV.—LOSS OF FREIGHT.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good. (See Rule XI., Antwerp.)

RULE XVI.—AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE.

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss

which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel, or at the termination of the adventure.—(See Rule XII., Antwerp, on page 96.)

RULE XVII.—CONTRIBUTORY VALUES.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowners' freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deductions being also made from the value of the property of all charges incurred in respect thereof subsequently to the General Average Act, except such charges as are allowed in general average. Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.—(See Rule X., Antwerp.)

RULE XVIII.—ADJUSTMENT.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

BE IT KNOWN THAT

as well in own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause and them and every of them, to be insured, lost or not lost, at and from

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present voyage, or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the same Ship

upon the said Ship, etc., and shall so continue and endure, during her Abode there, upon the said Ship, etc.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, etc., and Goods and Merchandises whatsoever, shall be arrived at

upon the said Ship, etc, until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, etc., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever

without Prejudice to this Insurance. The said Ship, etc., Goods and Merchandises, etc., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

TOUCHING the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, etc., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful

to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, etc., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

N.B.—Corn, Fish, Salt, Fruit, Flour and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

(*In the event of accident whereby loss or damage may result in a claim under this Policy the settlement will be much facilitated if immediate notice be given to the nearest Lloyd's Agent.*)

STANDARD FORM OF

SALVAGE AGREEMENT

(APPROVED AND PUBLISHED BY THE COMMITTEE OF LLOYD'S).

NO CURE—NO PAY.

On board the

Dated 19

IT IS HEREBY AGREED between Captain of the (afterwards called "the Master") and (afterwards called "the Contractor") as follows:—

1. The Contractor agrees to use his best endeavours to salve the and her cargo and take her into or other place to be hereafter agreed with the Master, providing at his own risk all proper steam and other assistance and labour. The services shall be rendered and accepted as salvage services upon the principle of "no cure—no pay" and the Contractor's remuneration in the event of success shall be £ , that being the sum demanded by him, unless this sum shall afterwards be objected to as hereinafter mentioned in which case the remuneration for the services rendered shall be fixed by Arbitration in London in the manner hereinafter prescribed: and any other difference arising out of this agreement or the operations thereunder shall be referred to Arbitration in the same way.

2. The Contractor may make reasonable use of the vessel's gear anchors chains and other appurtenances during and for the purpose of the operations free of costs but shall not unnecessarily damage abandon or sacrifice the same or any other of the property.

3. Notwithstanding anything hereinbefore contained should the operations be only partially successful without any negligence or want of ordinary skill and care on the part of the Contractor or of any person by him employed in the operations, and any portion of the Vessel's Cargo or Stores be salved by the Contractor, he shall be entitled to reasonable remuneration not exceeding a sum equal to per cent. of the estimated value of the property salved at or if the property salved shall be

sold there then not exceeding the like percentage of the net proceeds of such sale after deducting all expenses and Customs duties or other imposts paid or incurred thereon, but he shall not be entitled to any further remuneration reimbursement or compensation whatsoever and such reasonable remuneration shall be fixed in case of difference by Arbitration in manner hereinafter prescribed.

4. The Contractor engages not to arrest or detain the Vessel or Cargo or property salved except in the event of any attempt being made to remove the same from without his consent before the said sum of £ or the said maximum remuneration mentioned in Clause 3 (as the case may be) has been deposited in Cash with the Committee of Lloyd's to abide the result of the Arbitration hereinbefore mentioned, or such security or bail therefor as the Committee may in their absolute discretion consider sufficient has been given to them to abide the like result. Subject to this Agreement the Contractor shall have a lien on the property saved for his remuneration.

5. The Committee of Lloyd's after the expiry of 42 days from the date of the Deposit having been made or security or bail having been given, as provided for in Clause 4, shall realise or enforce the same and pay over the amount thereof to the Contractor, unless they shall meanwhile have received written notice of objection and a claim for Arbitration from any of the parties entitled and authorised to make such objection and claim, or unless they shall themselves think fit to object and demand Arbitration. The receipt of the Contractor shall be a good discharge to the Committee for any monies so paid, and they shall incur no responsibility to any of the parties concerned by making such payment, and no objection or claim for Arbitration shall be entertained or acted upon unless received by the Committee within the 42 days above mentioned.

6. In case of Arbitration the Committee of Lloyd's shall forthwith upon the publication of the Award pay to the Contractor out of the Cash deposit, or by realising or enforcing the security or bail the amount awarded to him, and shall pay the balance (if any) of the deposit to the Depositors, whose receipts shall be a good discharge for the same. If the award increases the remuneration the parties mentioned in Clause 12 shall pay the difference to the Contractor.

7. The Committee of Lloyd's shall not be in any way responsible for the sufficiency of any security or bail accepted by them, nor for the default or insolvency of any person giving security or bail.

8. In case of objection being made and Arbitration demanded, the remuneration for the services shall be fixed by the Committee of Lloyd's as Arbitrators or at their option by an Arbitrator to be appointed by them, unless they shall within 30 days from the date of this Agreement receive from the Contractor a written or telegraphic notice appointing an Arbitrator

on his own behalf, in which case such notice shall be communicated by them to the Managing Owner of the vessel, and he shall within 15 days from the receipt thereof give a written notice to the Committee of Lloyd's appointing another Arbitrator on behalf of all the parties interested in the property salved; and if the Managing Owner shall fail to appoint an Arbitrator as aforesaid the Committee of Lloyd's shall appoint an Arbitrator on behalf of all the parties interested in the property salved or they may if they think fit direct that the Contractor's nominee shall act as sole Arbitrator; and thereupon the Arbitration shall be held in London by the Arbitrators or Arbitrator so appointed. If the Arbitrators cannot agree they shall forthwith notify the Committee of Lloyd's, who shall thereupon either themselves act as Umpires or shall appoint some other person as Umpire. Any award of the Arbitrators or Arbitrator or Umpire shall be final and binding on all the parties concerned, and they or he shall have power to obtain, call for, receive and act upon any such oral or documentary evidence or information (whether the same be strictly admissible as evidence or not) as they or he may think fit, and to conduct the Arbitration in such manner in all respects as they or he may think fit, and to maintain, reduce or increase the sum demanded by the Contractor. The Arbitrators or Arbitrator and the Umpire (including the Committee of Lloyd's if they act in either capacity) may charge such fees as they may think reasonable, and the Committee of Lloyd's may in any event charge a reasonable fee for their services in connection with the Arbitration, and all such fees shall be treated as part of the costs of the Arbitration and Award, and shall be paid by such of the parties as the Award may direct. Save as aforesaid the statutory provisions as to Arbitration for the time being in force in England shall apply.

9. The Committee of Lloyd's may in their discretion out of the Cash deposit or out of the security or bail (which they may realise or enforce for that purpose) pay to the Contractor on account before the publication of the award such sum as they may think reasonable on account of any out-of-pocket expenses incurred by him in connection with the services.

10. The Master is not authorised to make or give and the Contractor shall not demand or take any payment, Draft or Order for or on account of the remuneration.

11. Any dispute between any of the parties interested in the property salved as to the proportions in which they are to contribute to the Cash deposit or the sum awarded or provide the security or bail, or as to any other matter concerning them, shall be referred to and determined by the Committee of Lloyd's, whose decision shall be final and is to be complied with forthwith.

12. The Master enters into this Agreement as Agent for the Vessel and Cargo and the respective Owners thereof, and binds each (but not

the one for the other or himself personally) to the due performance thereof.

13. Any of the following parties may object to the sum named in Clause 1 as excessive or insufficient, having regard to the services which proved to be necessary in performing the Agreement, or to the value of the property salved at the completion of the operations, and may claim Arbitration, *viz.* : (1) The owners of the ship, (2) Such other persons together interested as owners and/or Underwriters of any part not being less than one-fourth of the property salved as the Committee of Lloyd's in their absolute discretion may by reason of the substantial character of their interest or otherwise authorise to object, (3) The Contractor, (4) The Committee of Lloyd's—Any such objection and the award upon the arbitration following thereon shall be binding not only upon the objectors but upon all concerned, provided always that the Arbitrators or Arbitrator or Umpire may in case of objection by some only of the parties interested order the costs to be paid by the objectors only, provided also that if the Committee of Lloyd's in their public capacity be objectors they shall not themselves act as Arbitrators or Umpires.

14. If the parties to any such Arbitration or either of them desire to be heard or to adduce evidence at the Arbitration, they shall give notice to that effect to the Secretary of Lloyd's, and shall respectively nominate a person in London to represent them for all the purposes of the Arbitration, and failing such notice and nomination being given within 14 days or such longer period as the said Committee of Lloyd's may allow after the notice of objection, the Arbitrators or Arbitrator or Umpire may proceed as if the parties failing to give the same had renounced their right to be heard or adduce evidence.

15. Any award, notice, authority, order, or other document signed by the Deputy Chairman or Secretary of Lloyd's on behalf of the Committee shall be deemed to have been duly signed by and shall have the same force and effect in all respects as if it had been signed by every member of the Committee.

LLOYD'S FORM OF RESPONDENTIA BOND.

KNOWN ALL MEN BY THESE PRESENTS

that I (the Master of the original Ship or other person having charge of the Cargo and intending to forward it) of am held and firmly bound unto (the Lender) of in the sum of sterling British money, to be repaid to the said his agent, attorney, executors, administrators, or assigns, for which payment I bind myself, my heirs, executors, and administrators, and also bind and hypothecate the cargo of laden or to be laden on board the ship (Forwarding Ship) for the voyage aftermentioned firmly by these presents. Sealed with my seal. Dated this day of 188

WHEREAS the ship (Original Ship) lately arrived at in distress in the course of a voyage from to with the above-named cargo, and the said vessel being found incapable of carrying on the said cargo the said (the Master of the original ship or other person having charge of the cargo) determined in the interest of all parties concerned to forward the said cargo to its destination in the ship (Forwarding Ship)

AND WHEREAS in order that the said cargo might be so forwarded it became necessary to provide funds to meet the expenses of discharging, warehousing, and reshipping the said cargo and other necessary disbursements on account of the said cargo

AND WHEREAS the said being without funds or credit at and urgently requiring the sum of for the said purposes, and having first duly communicated with or attempted to communicate with the owners of the said cargo with a view to obtain funds from them, was compelled to apply for a loan upon respondentia; AND WHEREAS the said who is hereinafter called the said lender proposed and agreed to advance upon such security the said sum of at a maritime premium of per cent. for the said voyage, and the said being unable to procure

such advance on more advantageous terms, accepted the said proposal [with the intervention and approval of the proper authorities at], and agreed so far as he lawfully could or might that the said security should have priority over all other claims upon the said cargo, whether by himself or any other person: AND WHEREAS the said lender has duly advanced the said sum in pursuance of the said agreement: NOW THE CONDITION of the above obligation is such that if the said do use his best endeavours to forward or bring the said cargo to its destination without unnecessary delay or deviation, and do within days after the arrival of the said cargo at and before the discharge or delivery of the said cargo shall be commenced, well and truly pay or cause to be paid to the said lender or to his order or assigns the said sum of together with the maritime premium thereon at the rate aforesaid, making in all the sum of such payment to be made at the exchange of for every British pound sterling, or if the said cargo shall be duly dispatched and forwarded on the said voyage without unnecessary delay or deviation, and the said cargo shall by perils of the sea be lost in the course of such voyage. Then the above-written obligation shall be null and void and the said shall be released from all liability in respect of the said sum of PROVIDED ALWAYS and it is hereby agreed and declared that if the said cargo shall in the course of the said voyage by perils of the sea as aforesaid be lost or so much damaged as that it cannot be carried to its said destination, then if any part thereof shall be saved the above security, so far as regards the property saved, shall remain in force, and the said lender or his assigns shall be at liberty forthwith to enforce the same against such property: PROVIDED ALSO, and the said loan is made upon the express condition, that the said lender does not accept or take upon himself any risk or liability on the said voyage except such as is hereby expressly mentioned, and shall not be liable to contribute to or make good any general or particular average loss or expenditure or other charges of a like nature which may happen to or be sustained by or incurred in respect of the said cargo or the said ship upon the said voyage in consequence of perils of the sea or otherwise

Signed, sealed, and delivered by the said

in the presence of

LLOYD'S FORM OF BOTTOMRY BOND.

KNOW ALL MEN BY THESE PRESENTS

that I Master of the Ship
of the Port of of the burthen of tons
or thereabouts am held and firmly bound unto of
in the sum of sterling
British money, to be repaid to the said his agent, attorney, executors, administrators, or assigns, for which payment I bind myself, my heirs, executors and administrators, and also bind and hypothecate the said ship and the freight to become due in respect of the voyage aftermentioned and the cargo laden or to be laden on the said voyage firmly by these Presents sealed with my seal. Dated this day of 19

WHEREAS the said ship lately arrived at in distress, having sustained damages in the course of a voyage from to laden with and being in want of repairs, supplies and provisions to enable her to continue her said voyage: AND WHEREAS the said being without funds or credit at and urgently requiring the sum of to pay the said repairs, supplies and provisions, and to discharge the lawful and necessary disbursements of the ship at and to release her from her liabilities, and to enable her to continue her voyage, and having first duly communicated or attempted to communicate with the owners of the said ship and of the said cargo with a view to obtain funds from them, was compelled to apply for a loan upon bottomry of his ship, her cargo and freight: AND WHEREAS the said who is hereinafter called the said lender, proposed and agreed to advance upon such security the said sum of at a maritime premium of per cent. for the said voyage, and the said being unable to procure such advance in any quarter on more advantageous terms, accepted the said proposal [with the intervention and approval of the proper authorities at], and agreed so far as he lawfully could or might that the said security should have priority over all other claims on the said ship, freight, and goods, whether by himself or any other person: AND WHEREAS the said lender has duly advanced

the said sum in pursuance of the said agreement: NOW THE CONDITION of the above obligation is such that if the said do with the said ship and cargo duly prosecute the said voyage without unnecessary delay or deviation, and do within days after the arrival of the said ship or cargo at and before commencing to discharge or deliver her cargo there, pay or cause to be paid to the said lender or to his order or assigns the said sum of together with maritime premium thereon at the rate aforesaid, making in all the sum of such payment to be made at the exchange of for every British pound sterling, or if the said ship with the said cargo shall duly prosecute her said voyage without unnecessary delay or deviation, and shall be by perils of the sea lost in the course of such voyage, then this obligation shall be null and void, and the said shall be released from all liability in respect of the said sum of PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said ship shall by perils of the sea as aforesaid be lost or so much damaged as to be unable to complete her said voyage, then if any part of the said ship or cargo or of the said freight shall be saved or earned, the above security, so far as regards the property saved or freight earned, shall remain in force, and the said lender or his assigns shall be at liberty forthwith to enforce the same against such property and freight: PROVIDED ALSO, and the said loan is made on the express condition, that the said lender doth not accept or take upon himself any risk or liability on the said voyage except such as is hereby expressly mentioned, and shall not be liable to contribute to or make good any general or particular average loss or expenditure or other charges of a like nature which may happen to or be sustained by or incurred in respect of the said ship or her cargo or freight upon the said voyage in consequence of perils of the sea or otherwise.

Signed, sealed, and delivered by the said

in the presence of

LLOYD'S AVERAGE BOND.

AN AGREEMENT made this day of 19
BETWEEN Master of the Ship
or Vessel called the and the several Persons
whose names or Firms are set and subscribed hereto, being respectively consignees of Cargo on Board the said Ship of the other part WHEREAS the said Ship
lately arrived in the Port of on a voyage from
and it is alleged that during such voyage she met with bad weather and sustained damage and loss and that sacrifices were made and expenditure incurred which may form a Charge on the Cargo or some part thereof or be the subject of a *Salvage and/or* a general average contribution, but the same cannot be immediately ascertained, and in the meantime it is desirable that the cargo shall be delivered; NOW THEREFORE THESE PRESENTS WITNESS and the said Master on his own behalf and on behalf of his owners in consideration of the agreement of the parties hereto of the second part hereinafter contained, hereby agrees with the respective parties hereto of the second part that he will deliver to them respectively their respective consignments on payment of the freight payable on delivery, if any, and the said parties hereto of the second part in consideration of the said Agreement of the said Master for themselves severally and respectively, and not the one for the others of them, hereby agree with the said Master that they will pay to the said Master or the Owners of the said Ship the proper and respective proportion of any *Salvage and/or* general average and/or particular and/or other charges which may be chargeable upon their respective consignments or to which the Shippers or Owners of such consignments may be liable to contribute in respect of such damage, loss, sacrifice, or expenditure, and the said parties hereto of the second part, further promise and agree forthwith to furnish to the captain or Owner of the said Ship a correct account and particulars of the value of the goods delivered to them respectively, in order that any such *Salvage and/or* general average and/or particular and/or other charges may be ascertained and adjusted in the usual manner.

AND WHEREAS at the request of the owner of the said Ship the parties hereto of the second part have respectively deposited or agreed to deposit in the Bank of in the joint names of nominated on behalf of the Shipowners and nominated on behalf of such Depositors the sum of £ per cent. on the amount of the estimated value of their respective interests. NOW IT IS HEREBY further agreed, that the sum so deposited by the said parties respectively shall be held as security for and upon trust for the payment to the parties entitled thereto, of the *Salvage and/or* general average and/or particular and/or other charges payable by the said parties hereto of the second part respectively as aforesaid, and subject thereto upon trust for the said Depositors respectively.

PROVIDED ALWAYS that the said Trustees may from time to time, pending the preparation of the usual statement, pay to the said parties of the first part in respect of the amounts which may ultimately be found due from said depositors respectively, and pay or refund to the parties hereto of the second part, or any of them, in respect of the amounts which may ultimately be found due to them, such sums out of the said deposits as may from time to time be certified by the Adjuster or Adjusters who may be employed to adjust the said *Salvage and/or* general average and/or particular and/or other charges to be a proper sum or proper sums to be advanced by the said Trustees on account of the said amounts. AND IT IS HEREBY DECLARED AND AGREED that any payment or payments on account which shall be made by the said Trustees under or in accordance with the statement or in pursuance of any Certificate to be made or given by the said adjusters as aforesaid shall discharge such Trustees from all liability in respect of the amounts so paid; and it shall not be necessary for them to inquire into the correctness of the Statement or Certificate. PROVIDED ALWAYS that the deposits so to be made as aforesaid shall be treated as payments made without prejudice and without admitting liability in respect of the said alleged *Salvage and/or* general average and/or particular and/or other charges, and as though the same had been made by the depositors respectively for the purpose only of obtaining delivery of their goods; and in like manner all amounts returned by the Trustees to the depositors shall be received by the latter respectively without prejudice to any claim which the master or owners of the said ship may have against them respectively. And nothing herein contained shall coustitute the said Adjuster or Adjusters an arbitrator or arbitrators, or render his or their Certificate or Statement binding upon any of the parties.

IN WITNESS

AN AGREEMENT[1] made this day of 19
BETWEEN

being the
of the Ship or Vessel called
the " " of the first part, and the
several persons whose names or firms are set and subscribed hereto, being respectively Owners or Consignees of Cargo on board the said Ship, or their Agents, of the second part (hereinafter called the Consignees).

WHEREAS, the said Ship lately arrived in the Port of

on a voyage from and it is alleged that during such

voyage sacrifices were made and/or expenditure incurred which may form a charge on the cargo, or some part thereof, or be the subject of a general average contribution, but the same cannot be immediately ascertained, and in the meantime it is desirable that the cargo should be delivered; NOW THEREFORE THESE PRESENTS WITNESS, and the said parties hereto of the first part on their own part, and (if Agents) on behalf of the Owners and Master of the said vessel, in consideration of the agreement of the Consignees hereinafter contained, hereby agree with the respective Consignees, that they will deliver to them respectively their respective consignments, on payment of the freight payable on delivery, if any, and on making a reasonable deposit as security for General Average, Salvage and/or particular or other charges as hereinafter provided, if required, and the said Consignees in consideration of the said agreement of the parties hereto of the first part for themselves severally and respectively, and not the one for the others of them, hereby agree with the parties hereto of the first part, that they will pay to the parties entitled thereto the proper and respective proportion of any General Average, Salvage and/or particular or other Charges, which may be payable upon their respective consignments, or for which the Shippers or Owners of such consignments may be liable in respect thereof. And it is hereby agreed that the adjustment shall be made by

being of the Association of Average Adjusters, who shall

send to each of the parties hereto a copy of Adjustment on the date

[1] This Agreement has been approved by The Liverpool Underwriters' Association; The Incorporated Chamber of Commerce, Liverpool; The Liverpool Shipowners' Association; The Liverpool Steamship Owners' Association; and The Liverpool Average Adjusters' Association.

thereof. AND the said Consignees further promise and agree forthwith to furnish to the said Adjuster a correct account of the particulars and values of the goods laden on board and/or delivered from the said Ship and owned by or consigned to them respectively, and such other information as may be required in order that any such General Average and other charges may be adjusted in the usual manner.

AND WHEREAS, at the request of the parties hereto of the first part, the Consignees or some of them (hereinafter called the Depositors) have respectively deposited, or agreed to deposit, on account of such General Average, Salvage, and/or particular or

other charges, in the Bank

in the joint names of nominated on

behalf of the parties of the first part, and

nominated on behalf of such Depositors (hereinafter called the Trustees), the sums which have been mutually agreed upon or have been or are about to be fixed by the said Adjuster . NOW IT IS HEREBY FURTHER AGREED, that the deposits so made shall be held as security for and upon trust for the payment to the parties entitled thereto of the General Average, Salvage and/or particular or other Charges payable by the Depositors, and subject thereto upon trust for the said Depositors respectively. AND IT IS FURTHER AGREED AND DECLARED AS FOLLOWS :—

I. THAT the Trustees may make advances to, or payments on behalf of any of the parties hereto out of the said deposits of such sums in respect of any disbursements made, or about to be made, or losses sustained, by or on behalf of those parties respectively, or by those whom they represent, as the Adjuster may certify to be wholly or in part chargeable against the Depositors, or some of them, after taking into account any sums which may be payable to them. That the Trustees may at any time return to any Depositor such portion of his deposit as the Adjuster may certify to be in excess of the amount reasonably required from him as security.

II. THAT upon the expiration of 14 clear days from the date of issue of the Adjustment, the Trustees shall distribute and pay the deposits remaining in their hands in accordance with the said

Adjustment, unless they (or one of them) shall in the meantime have been served by one or more of the parties hereto with notice in writing that he, or they, object to the Adjustment and require them (the Trustees) to retain the deposits, or some part thereof, in their hands, pending the settlement of such objection.

III. THAT the party or parties giving such notice shall at the same time furnish the Trustees with particulars of the item or items objected to and the grounds of the objection.

IV. THAT if and when such notice and particulars shall have been duly given to the Trustees, they may only pay over and distribute the balances in accordance with the Adjustment at the expiration of the aforesaid period of 14 days, if and in so far as the same shall not be affected by the objection, and shall retain in their hands so much of the deposits as in their judgment may be effected by the objection.

V. THAT at the expiration of a further period of thirty clear days (from the expiration of the before-mentioned period of 14 days), unless legal proceedings shall have been commenced or an arbitration agreed upon for the purpose of settling the questions raised by the objection, or some of them, and notice in writing of such proceedings shall have been served upon the Trustees (or one of them), or unless they shall be satisfied that further delay is desirable for the purpose of arriving at a settlement, the Trustees may (without prejudice to any question or dispute as to the Adjustment) pay over the monies retained in their hands to the parties who shall appear by the Adjustment to be entitled thereto.

VI. THAT all payments made by the Trustees, whether as advances, payments, or returns, before the issue of the Adjustment, or by way of distribution and settlement, in whole or in part, of the deposits in accordance with the Adjustment, after the same shall have been issued, or otherwise under this agreement, shall, if made with due care, discharge the Trustees from all liability in respect of the amounts so paid, but shall not be otherwise final, and that any such payment shall be wholly without prejudice to any objection or question which may be raised with respect to the Adjustment.

As Witness the hands of the Parties :—

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OCTOBER, 1900.

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